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Supreme Court of the United States

October Term 1940

No. 610

J. TOM WATSON (GIBBS) Individually and as  
Attorney General of the State of Florida, et al.,  
*Appellants*

—vs.—

GENE BUCK, Individually and as President of the American  
Society of Composers, Authors and Publishers, et al.  
*Appellees.*

No. 611

GENE BUCK, Individually and as President of the American  
Society of Composers, Authors and Publishers, et al.  
*Appellants*

—vs.—

J. TOM WATSON (GIBBS) Individually and as  
Attorney General of the State of Florida, et al.,  
*Appellees.*

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES  
FOR THE NORTHERN DISTRICT OF FLORIDA

**BRIEF FOR APPELLANTS (Defendants Below)**  
**In Case 610—and—APPELLEES in Case 611**

J. TOM WATSON,  
Attorney General of Florida.

LUCIEN H. BOGGS,  
Jacksonville, Florida.

✓ TYRUS A. NORWOOD,  
Assistant Attorney General  
of Florida.

✓ ANDREW W. BENNETT,  
Washington, D. C.

*Counsel for Appellants*

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No. 610

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*Appellees*

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES  
FOR THE NORTHERN DISTRICT OF FLORIDA

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## BRIEF FOR APPELLANTS in Case 610 and APPELLEES in Case 611

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### Opinion Below

The opinion of the United States District Court for the Northern District of Florida is reported in 34 Federal Supplement, 510. This is the second appearance of the case in this Court, the previous opinion being reported as *Gibbs v. Buck*, 307 U. S. 66.

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NOTE: Emphasis in quoted matter in this brief is supplied unless otherwise indicated.

## **Jurisdiction**

Jurisdiction rests upon U. S. Code, Title 28, Section 380. Paragraph 1 of Rule 12 has been complied with and this Court has noted probable jurisdiction.

## **Statement of the Case**

This suit was originally brought to enjoin the enforcement of Chapter 17807, Laws of Florida 1937, and was extended by supplemental bill to attack Chapter 19653, Laws of Florida 1939, copies of which statutes are appendices "A" and "B" to this brief. For a complete analysis of the provisions of these two statutes see notes to opinion in *Buck v. Gibbs*, 34 F. Supp. 510.

The appellees in Case 610 and appellants in Case 611 were the plaintiffs in the Court below and will be referred to in this brief as "plaintiffs." They are the authors, composers or publishers of musical copyrights which have been pooled for licensing of performing rights with plaintiff. American Society of Composers, Authors and Publishers. Appellants in Case 610 and appellees in Case 611 were the defendants in the case below and will be referred to as "defendants." They are the State officers charged with enforcement of the two statutes.

It was alleged in the original and supplemental bills of complaint (R. 1, 111) that the statutes were class legislation aimed at the defendants; that they violated the copyright clause, Art. I, Sec. 8; impairment of contract clause, Art. I, Sec. 10, and the Interstate Commerce clause, Art I, Sec. 8, and the Fourteenth Amendment of the Constitution of the United States; and that they also violated Sections 1, 8 and 12 of the Declaration of Rights of the Florida Con-

stitution, which provide against self-incrimination, cruel and unusual punishment and equal protection and for liberty of contract.

The defendants contended by their motions and answer (R. 78, 100, 179, 182) that since the plaintiffs were a self-confessed price-fixing monopoly engaged in restraint of trade, the Court should not have granted any injunctive relief in aid of those same illegal activities; that the statutes represent a valid exercise of the State police power to regulate and prevent the evils of combinations fixing prices and unreasonably restraining trade; that the 1937 Act was principally an anti-monopoly act and as such was valid; that Sections 2-A, 2-B and 6 which purport to authorize the performance within the State of copyrighted musical compositions without payment by users therefor were repealed by the 1939 Act; that the 1939 Act was principally enacted to compel disclosure of ownership in order to protect music users against imposition in the matter of copyrighted music.

The original bill of complaint was filed with a motion for a temporary injunction. Defendants filed motion to dismiss the bill (R. 78) on the ground that there was lack of federal jurisdiction and on the grounds generally set forth above. The Court granted the interlocutory injunction and denied the motion to dismiss on the ground that there was doubt as to the constitutionality of the 1937 Act, and its immediate enforcement might produce irreparable injury. Defendants appealed to this Court, which affirmed the lower court on the grounds that there was a sufficient showing of federal jurisdiction and no abuse of discretion in granting a temporary injunction. All other questions were expressly reserved for final hearing. (307 U. S. 66.)

Mr. Justice Black in a minority opinion stated that there was no doubt of the power of the State to enact such a statute in restraint of monopoly; that there was no duty on the defendants to enforce any provisions other than those prohibiting price-fixing; that the offices had properly disclaimed any duty to enforce Sections 2-A, 2-B and 6 and thereby made moot all question of the constitutionality of those sections; that on the record the plaintiff Society was a powerful, price-fixing combination:

" \*\*\* that actually wields the power of life and death over every business in Florida and elsewhere dependent upon copyrighted musical compositions for existence." *Gibbs v. Buck, supra*, at page 82.

The Court granted an interlocutory injunction against the enforcement of the 1939 law and entered its supplemental findings of fact and conclusions of law (R. 182). Defendants filed their answers to the bill and further supplemental bill (R. 100, 185) in which the defenses hereinabove set forth were alleged.

The case thereupon came on for trial and evidence was taken before the three judges at Gainesville, Florida, (R. 463-1082); also the depositions of certain witnesses were introduced at the trial (R. 191-463).

After hearing the evidence and arguments of counsel, the court entered its findings of fact and conclusions of law (R. 1082), and rendered an opinion in which it held that Sections 2-A, 2-B, 6 and 4-A, 4-B, and 5-A and 5-B of the 1937 laws were unconstitutional, and since these provisions were not severable from the remaining provisions of the law, the whole statute was invalid.

The court did not discuss the evidence as to the price-fixing monopoly and restraint of trade in which the plaintiffs were shown to be engaged, nor did it discuss the constitutionality of the anti-monopoly provisions of the 1937 Act. It upheld the constitutionality of the 1939 Act with the exception of Sections 4-A and 4-C, these being stricken because the court was of the opinion that they violated plaintiff's rights under the copyright laws, and were not a reasonable exercise of the police power of the State.

A final decree (R. 1104), granting permanent injunction as to the 1937 Act in its entirety, but only as to Sections 4-A and 4-C of the 1939 Act, was entered by the Court. From that decree both plaintiffs and defendants appealed. (R. 1106, 1113.)

### **Specification of Errors Intended to Be Urged**

Defendants urge that the court below erred:

(1) In failing to find and hold that the plaintiffs were a price-fixing monopolistic combination engaged in restraint of trade, not entitled to injunctive aid in furtherance of those activities (Assignment 7, R. 1108);

(2) In failing to hold and find that Section 1 and the other sections of the 1937 Act not found to be void *per se* were separable and valid, Despite the invalidity of the other sections (Assignments 4, 5, and 6, R. 1108).

(3) In refusing to hold that all questions as to the constitutionality of Sections 2-A, 2-B and

6 of the 1937 Act were moot inasmuch as the defendants had no duties to perform with respect said sections, and in failing to find and hold that those sections had been repealed by Chapter 19653, Laws of Florida, 1939 (Assignments 8 and 9, R. 1108);

(4) In holding Section 4-A of the 1939 law unconstitutional, and in failing to recognize that it does not interfere with the right of the individual copyright owner to license or refuse to license his copyrights as he sees fit, but merely regulates the terms under which two or more owners of copyrights may pool their compositions for blanket licenses; and that the statute constitutes a reasonable exercise of the police power of the State of Florida (Assignments 11, 13, 15, R. 1109).

(5) In holding Section 4-C of the 1939 Act unconstitutional, and in failing to recognize that it was enacted in the public welfare because designed to promote the liberal use of music without the limitation imposed by the enforced payment of a percentage of the gross receipts of the users (Assignments 12, 14, 15, R. 1109).

### **Summary of Argument**

Defendants' contentions are as follows:

#### **I.**

**The Court should not have granted injunctive aid to the plaintiffs because they came into court with "unclean hands."**

Under this point of the argument, it will be shown that plaintiffs are by the record in this case shown to be a price-fixing monopoly engaged in restraint of trade, and that the injunctive relief sought is in aid of those same illegal activities and should have been denied under the "clean hands" doctrine.

## II.

**The provisions of the 1937 Act were severable, and the Court should not have struck down the whole act merely because it found certain sections void.**

Under this point, it will be shown that the provisions of the 1937 Act are not an integrated whole, but are separable in effect and by legislative declaration; one that of the purposes of the Act was to prevent price-fixing monopolies from operating in the State; that the anti-monopoly provision, Section 1, and the sections for enforcement thereof, evince a legislative intent entirely distinct from the sections which the court held unconstitutional *per se*, and should not have been invalidated on the ground of inseparability.

That Sections 2-A, 2-B and 6 are clearly separable because: (1) they were repealed by Chapter 19653, Laws of 1939; (2) defendants have no duties to perform with regard to them; (3) their purpose is wholly unrelated to the anti-monopoly provisions of the act.

That Sections 4-A, 4-B, 5-A, and 5-B are separable from the other provisions of the act because they are merely subordinate and supplementary to Section 1.

## III.

**Section 1 of the 1937 Statute and its dependent sections represent a valid exercise of the police power of the State of**

**Florida, for the prevention of monopoly and unreasonable restraints of trade.**

Under this point of the argument, it will be demonstrated that the sections of the act, which the court did not declare void *per se*, represent a constitutional exercise of the police power of the state, directed to the protection of its citizens from the activities of combinations attempting to monopolize public performance rights in copyrighted music.

**IV.**

**Section 4-A of the 1939 Act constitutes a valid regulation of price-fixing combinations.**

Under this point, it will be shown that since the state has the right to prohibit altogether price-fixing combinations, it has power to make a lesser regulation by requiring combinations of two or more owners of music to offer users the option to take a license on a per piece basis fixed

by the individual owner; that this section does not apply to the individual copyright owner acting alone, but only when two or more act in a combination.

**V.**

**Section 4-C of the 1939 Statute is not invalid because it limits compensation for licensing the use of musical copy rights to programs actually using the music.**

This point will deal with the practice of charging the entertainment industries for the use of copyrighted music on the basis of a flat percentage of gross receipts, regardless of whether the licensor's music was much or little, or at all used. It will be shown that this arrangement

constitutes a pernicious restraint of trade, because the users of the music, being compelled to pay the licensors on their gross income regardless of the use of the music, are deprived of all incentive to develop or use competing music or other competing forms of entertainment; that this is the evil which Section 4-C is designed to prevent.

### **Argument**

#### **1. INJUNCTIVE AID TO THE PLAINTIFFS SHOULD NOT HAVE BEEN GRANTED BECAUSE THEY CAME INTO COURT WITH "UNCLEAN HANDS," SEEKING AID IN PERPETUATING THEIR MONOPOLISTIC ACTIVITIES.**

In 1937, and for many years prior thereto, there existed in the State of Florida a deplorable situation affecting the users of copyrighted music for public performance for profit. The publishers of copyrighted music had combined with the renowned and outstanding authors and composers of music into combinations or associations for the express purpose of fixing prices for the licensing of rights of public performance for profit of their copyrighted music. The users were subjected to various kinds of discriminations in the rates charged for the use of music by the combinations or associations. They were forced to buy performance rights in all or none of the copyrighted music which the various combinations controlled or claimed to control. They could not deal directly with any separate copyright owner for the use of the music which that copyright owner might control, but all negotiations for the purchase of performance rights had to be carried on with the price-fixing combination who forced the purchaser to purchase the right to use all the music which the combination controlled at a price fixed and determined by the combination, not by the copyright

owner, although the prospective purchaser may have had no desire to use the music of more than one copyright owner, and not all of that.

To remedy this situation, the Legislature of Florida enacted the 1937 Statute (App. "A") and later supplemented and modified this statute by enacting the 1939 Statute (App. "B").

At the time of the enactment of the 1937 Statute and thereafter there were several minor combinations of owners of copyrighted music licensing performance rights in Florida and elsewhere in the United States, but domination in the licensing field was maintained by the American Society of Composers, Authors and Publishers (hereafter called the "Society"), one of the plaintiffs herein. So great has been this domination and so vicious have been the restraints imposed by the concerted action of the members of the Society acting through the Society, that the United States Department of Justice on August 30, 1934, commenced equity proceedings against the Society for injunctive relief under the Sherman Anti-Trust Laws, which action still is pending, (*U. S. v. American Society of Composers, Authors and Publishers*, District Court of U. S. for Southern District of N. Y. Equity No. 78-388). This culminated, on February 5, 1941, in the institution of criminal prosecutions by the filing of a criminal Information for violations of the Sherman Act (*U. S. v. American Society of Composers, Authors and Publishers*, District Court of U. S. for Eastern District of Wisconsin, Criminal No. 4492).

The historical resume given above is fully supported by the record references furnished in the next succeeding section of this brief.

### Plaintiffs' Monopolistic Activities in Violation of the Sherman Act

That plaintiff Society is a price fixing combination operating in restraint of trade is incontrovertibly demonstrated by plaintiffs' pleadings and by the evidence in this case.

1. At the time of enactment of the 1937 act, plaintiff Society admitted having approximately 123 publisher members, approximately 1,000 composer and author members (bill par. 17, R. 16) and an additional 44,000 composers, authors and publishers represented by the Society under its agreements with foreign societies, (bill par. 20, R. 17), all of whom bound themselves together for the declared purpose of fixing prices for the right to perform their combined music publicly for profit (bill Ex. D., Art of Asso., Art. 1, Sec. 1 (g), R. 51). By 1939, the admitted publisher members had increased to 131, with some 163 additional publishers owned or controlled by the publisher members, and some 1477 composer and author members. (Further Supp. Bill Ex. Q., R 155-178). However, tabulations made from the Society's own publications disclose that the Society's publisher members and subsidiaries totaled at least 311 and that the foreign publishers coming under the Society's control through affiliation contracts with foreign societies totaled at least 3513 (Def. Tr. Ex. A-3 and A-4, R. 542-543, 958-964).

2. With rare exceptions, the copyright owner of musical compositions is the publisher and not the composer and author (Bill, pars. 8-14, R. 8-15 and Ex. A thereto, R. 37; pltfs tr. Ex. 7 and 8, R., 927-935; pltf's dep. Ex. 7, R. 274, 990 A; Test. pltf's witnesses R. 290, 441). By the terms of the plaintiff's deposition exhibit 7 entitled "Stan-

dard Uniform Popular Songwriters Contract" and endorsed by the Society and the songwriters and publishers associations respectively, the writer "sells, assigns, transfers and delivers to the publisher, its successors and assigns, a certain heretofore unpublished original musical composition," etc. (R. 990 A). Consequently plaintiffs' repeated references to composers and authors in such manner as to imply that they are the copyright owners should be totally disregarded. The power of the Society to dominate and to fix prices has been derived primarily from the publishers as it is only published music which is normally available for public performance (BUCK Test. R. 798, 803). Unpublished manuscripts usually are not available for public performance purposes. (R. 803.)

3. The management of the Society was, and is, vested exclusively in a self-perpetuating Board of Directors, consisting of 24 persons; 12 of whom represent publisher members; 6 represent composer members and 6 represent author members. Each director is elected to serve for a period of three years and is eligible for re-election. The terms of eight members of the Board expire each year and their successors are elected annually by the remaining members of the Board. The directors have exclusive and absolute control of the management and of all activities of the Society, including the power to fix prices, the distribution of the proceeds to members, the appointment of all committees, officers and employees. (Bill, Ex. D. Art of Asso. Art. 4, Sec. 1; Art. 5, Sec. 1-2; R. 53, 54). Pursuant to the power "to fix the rate, time and manner of payment of royalties for the performance of all works registered with the Society" (Art. of Asso. Art. 5, Sec. 2; R. 54), the plaintiff Society issues to businesses using music, only

blanket licenses conferring upon the user the right to perform publicly for profit all of the copyrighted musical compositions in the "vast reservoir" pooled in the Society. (Bill, Pars. 20-23; R. 17-21), and the blanket license fee is "fixed and determined" by the Society. (Bill, Par. 23, R. 20.)

4. The power of the combination exerted through the Society has been so great that the majority of the radio broadcasting stations of the United States, and all but one in the State of Florida, have been compelled to accept a license contract to perform the Society-controlled music, wherein the stations have been compelled to pay to the Society a fixed annual sustaining fee plus 5 percent of the gross receipts of the stations from all programs including those in which no music controlled by the Society is used, such as: sport events, news broadcasts, dramatics, and others. (Bill Ex. "F" R. 70, 1005-1007; Def. Test. TISON, R. 577-578; MITCHELL, R. 583-584; GILLIN, R. 870.) Political broadcasts, and newspaper-controlled radio stations however, are given special concessions. No percentage charge is made against political broadcasts, and newspaper controlled stations were given discriminatory license fees, in that no charge was made against income derived from programs which did not use the Society's music and a smaller sustaining fee was required, as will appear in more detail hereafter. (Def. Ex. A-7, R. 583, 1006-A, C.)

This power to fix prices has been applied to all other users of music in classified uniform contracts with prices determined by the Society. (Bill Ex. G and H, R. 74 and 75; pltf's dep. Ex. 20 to 34 inc.; R. 406 to 411, 1008-1038.)

5. As pointed out above, the Society's dominating

power to fix prices has been obtained primarily through the publishers, since unpublished manuscripts usually are not available for public performance purposes. By admission of the Society's own witnesses, the Society controls "substantially all of the music in a form suitable for public performance for profit" (SCHIRMER, R. 357); it controls three to four hundred thousand copyrights—70 percent of the copyrighted music in the United States—95 percent of the popular music. (BUCK, R. 798, 803, 806-807.) To like effect was the testimony of plaintiffs' witness MILLS (R. 522) and defendant's witnesses (BELVISO, R. 561; TISON, R. 580; MITCHELL, R. 583; GILLIN, R. 867-868, 871, 872, 878).

The truth of the admissions on cross-examination by plaintiffs' witnesses and the testimony of defendant's witnesses is demonstrated by the statistical exhibits and by figures stipulated in the record, which discloses that approximately one-half of the average total of 25,000 musical compositions, both published and unpublished, registered annually with the United States Register of Copyrights are recorded in the names of the publisher members of the Society and publisher members of its foreign affiliates. (R. 542-544, 558-559, Def. Tr. Ex. A-3 and A-4, R. 958-965), though plaintiffs' witness MILLS testified that the Society did not control more than 2500 to 3000 of the annual registrations (R. 506). These tabulations covered specimen years at random during the period from 1913 to 1933, and disclosed the *minimum* copyright entries for those years which are controlled by the Society, since no effort was made to tabulate the entries made by the 56,000 (R. 501) composer and author members of the Society and foreign affiliates. Moreover,

the average 25,000 annual registrations of copyrights included both published and unpublished copyrights, whereas the copyright entries for the publishers are primarily published copyrights. Therefore, the Society's actual control of music available for public performance represents substantially more than the approximate 50 percent disclosed by the tabulations.

When it is considered that there are only some 480,656 published copyrights plus some 80,422 renewals of expired copyrights (a total of 561,077) registered with the Register of Copyrights during the past 28 years, the statutory life of a copyright (Def. Tr. Ex. A-5, R. 543, 965), and when the admissions of the plaintiff Buck (Society's President) that the Society controls between three and four hundred thousand copyrights are considered, the dominating power of the Society is apparent. This domination is corroborated further by the defendants' trial Ex. A-1 (R. 537-539, 953-954B) which disclosed that 2644 music publishers who are not members of the Society had registered with the Register of Copyright only 24,927 published musical compositions during the 30-year period from July 1, 1909 to Nov. 27, 1939. The list of these 2644 non-member publishers was compiled from a list prepared by plaintiff Society in 1937 which included "all publishers who registered themselves as such with the Copyright Office in Washington, D. C." (MILLS R. 509; pltf's Ex. 1, R. 918.)

6. The power created in plaintiff Society by vesting in it the exclusive public performance rights to this "vast reservoir" of music (bill par. 20, R. 18) which contains "substantially all of the music in a form suitable for public performance for profit" (SCHIRMER, R. 357), has

constituted an instrument for evil over every business dependent upon modern copyrighted music for existence. It has been used:

(a) To establish arbitrary discrimination in license fees between comparable and competing radio stations located in the same city, i. e. Tampa, Fla. (TISON, R. 577-578; MITCHELL, R. 583-584). WDAE, *owned by a newspaper*, was only required to pay to the Society a sum equal to 5 percent of the income derived from programs using the music controlled by the Society (R. 583), and this gave WDAE a saving in license fees during 1937 to 1939 of \$5,111.18 over what it would have paid had it been required to pay on the same basis as its competitor, WFLA (R. 584). On the other hand, WFLA, *not newspaper owned*, was compelled to pay 5 percent of its gross income to the Society, although from 25 percent to 35 percent of that income was derived from programs in which no music controlled by the Society was used. (R. 577);

(b) To divert music written by non-members of the Society into the control of its publisher members by the requirement undisclosed in the by-laws that a composer or author will not be admitted to membership in the Society until he has had at least five compositions published by ~~publisher~~members of the Society.

This fact was testified to unqualifiedly by Deems Taylor, of the Membership Committee of the Society (R. 233). Claude Mills, Chairman of the Administrative Committee, attempted to evade it when the Court interrogated him at final hearing (R. 515-516); later he denied it on cross-examination (R. 517). However, when confronted by a letter stating that the five publishers who accepted the applicant's compositions must be publisher members

of ASCAP, he was obliged to admit that the letter was written and signed by him (R. 519-520).

The importance of this requirement of author and composer membership is fundamental to a proper understanding of what the Society really is. Already it has been pointed out that, with few exceptions, it is the publisher, not the author or composer, who owns the copyright. By limiting the eligibility for membership of authors and composers to those whose compositions are published by one or more publisher members of the Society the publisher members are put in a position to control the society and fix its policies.

Also, by dangling the bait of possible future membership in the Society before the eyes of the non-member authors and composers, the publisher members are enabled to have offered to them a large proportion of the new music composed. All of the public performance income from these compositions flows into the Society's treasury, and the non-member author or composer gets nothing. In this way, the Society catalogue has continued to pyramid to the prejudice of non-member publishers and to the prejudice of fair competition.

Moreover, though the non-member composer and author has surrendered his writings to publisher members of Society, he has no assurance he ever will be admitted to membership, as his admission is left to the arbitrary discretion of the Society's Board of Directors. That eligible composers and authors are denied membership is disclosed by the testimony on cross-examination of plaintiffs' witness Taylor, of the Membership Committee. (R. 234).

Thus, if one looks at realities instead of form, at facts instead of words, the Society is stripped of its mask and is seen to be a powerful and monopolistic association of publishers, who, as window dressing, keep up the front of an association for the protection of the poor composer and author.

(c) To enforce the Society's demand that it be paid a blanket fee from all commercial users of music, in the case of radio 5 percent of the station's gross income, whether or not the music controlled by the Society is used. In 1935, James W. Baldwin, then Managing Director of the National Association of Broadcasters, held powers of attorney from more than 300 of the then existing radio stations in the United States. (R. 569.) Acting under order of the National Association of Broadcasters, Mr. Baldwin endeavored to obtain from the Society a form of license wherein the license fee would be based on the amount of the Society-controlled music which was used. This effort failed. On or about January 11, 1936, the Society notified all stations that they must sign five-year extensions of the then existing contracts before January 15 or thereafter be subjected to infringement suits (R. 568-569). These extended contracts were in force at the time of the trial herein and continued in force until midnight December 31, 1940.

(d) To destroy the incentive of the users of music to perform any music which is not controlled by the Society, thereby depriving non-members of the Society of the principal means of exploiting the sale and distribution of sheet music to the general public. The evidence clearly established the fact that the Society's standing levy of 5 percent of all broadcasting income, whether or not the So-

ciety's music is used, destroys the incentive of all but the few privileged stations afforded the discriminatory newspaper contract to use the music of non-members, and thereby destroys the opportunity of non-members to operate successfully in competition with the Society or its publisher members.

This is demonstrated by the experience of Warner Bros. Picture Corporation during the first six months of 1936, when it attempted to operate in competition with the Society. The failure of that attempt, in spite of the vast resources of Warner Bros., was developed in the cross-examination of the Society's witness, Edwin H. Morris.

Morris testified as follows: He was vice president and general manager of all the Warner Bros. music subsidiaries and was a director of the Society. Warner Bros. owned Harms, Inc., M. Witmark & Sons, Remmick Music Corp., New World Corp., T. B. Harms Company, and Shubert Music Pub. Co. (R. 693). Those companies owned 20 percent to 22 percent of all music performed publicly for profit (R. 696), and for the year 1935 received from the Society approximately \$300,000 (R. 693). They "withdrew from the Society at the end of 1935 in an effort to set up our own performing rights bureau" (R. 693), and returned as members July, 1936, because Mr. Warner decided "that he could not make it a paying proposition." (R. 696.) Prior to January 1, 1936 the Warner Bros. music was available to all users under their Society license, but the Society did not reduce its license fees to compensate users for the loss of that important part of its repertoire (see five-year renewal agreement of January, 1936, attached to plaintiffs' bill exhibit F, R. 70-73 and Ex. 17-L., R. 1006-A-1006-C). That renewal agreement was accepted

upon the Society's ultimatum of January 11, 1936 (BALDWIN, R. 568-569), because there was no other recourse (TISON, R. 576-577; GILLIN, R. 871).

During the six months in which Warner Bros. attempted to compete with the Society, the performance of Warner Bros. music was very small (MORRIS, R. 696-697), and the sale of sheet music by the Warner Bros. subsidiaries dropped to less than one-third (R. 702-703).

The sheet music sales figures before, during the after that six months effort at competition speak eloquently. During the first six months of 1935, the sales amounted to \$696,782.90. During the last six months of 1935, the sales were \$715,000. For the first six months of 1936 when they attempted to compete with the Society, the total sales were only \$229,000. But immediately on their return to Society membership in July, 1936, sales jumped to \$616,000 for the last six months of 1936 (R. 702-703).

If the great organization of Warner Bros., with its extremely large catalogues of music backed by the promotion power of its motion picture affiliates could not compete successfully against the Society and its publisher members, what chance does an ordinary music publisher have? It demonstrates the truth of Morris's statement on direct examination that under the existing system, Warner Bros. Society membership represents "the difference between staying in business and going out of business." (R. 691-692.)

Thus the evils and restraints on commerce and on freedom of individual action caused by plaintiffs' exercise of their vast monopolistic power, establish as flagrant and vicious a violation of the Sherman Anti-Trust Laws as have ever been presented to the Courts. It tells the story

of a price-fixing monopoly in plaintiff Society which through the concerted action of its members created in the Society the power of life or death over entertainment industries dependent upon copyrighted music for existence. No excuses for the creation and wielding of such power legally are available to the plaintiffs. The law applicable to the facts long has been well established by the decisions of this Court, yet these time-worn excuses probably will be advanced by plaintiffs.

The lawful individual monopolies granted by the patent and copyright statutes cannot be unitedly exercised to restrain competition, to effect a monopoly, or to fix prices.

*Straus v. American Publishers Assn.* 231 U. S.  
222, 234-5.

*United States v. Interstate Circuit Inc. et al.*  
306 U. S. 208.

*Ethyl Gasoline Corp. v. United States*, 309 U. S.  
436.

The power to fix royalties created by combination is tantamount to the power to fix prices.

*Standard Oil Co. (Ind.) et al. v. United States*  
283 U. S. 163, 174.

The power to fix prices includes the power to control and dominate, and whether reasonably exercised or not, when acquired by concerted action of individual corporations or persons in pooling their individual powers, *per se* violates the Sherman Anti-Trust Act.

*United States v. Trenton Potteries Co. et al.*,  
273 U. S. 392.

The fact that the practice may have developed as the result of lengthy experimentation amongst parties to a conspiracy producing results contrary to the Sherman Act cannot give legality to their actions.

*Paramount Famous Lasky Corp. et al. v. United States* 282 U. S. 30, 43.

*Eastern States Retail Lumber Dealers Assn. v. United States* 234 U. S. 600, 613.

Neither good motives nor good primary intentions are material when results already accomplished by the acts of conspirators are involved.

*Standard Sanitary Mfg. Co. v. United States*, 226 U. S. 20, 49.

*United States v. Trans-Missouri Freight Assn.*, 166 U. S. 290, 340.

*Anderson v. Shipowners Assn. of Pacific Coast*, 272 U. S. 359, 400.

*Thomsen v. Cayser*, 243 U. S. 66, 86.

*Bedford Cut Stone Co. v. Stone Cutters' Assn.*, 274 U. S. 37, 55.

*Duplex Printing Press Co. v. Deering* 254 U. S. 443, 467, 468.

Thus, the excuses offered by plaintiffs are of no avail, and the Society stands proven by the record as a combination in restraint of interstate commerce—commerce in sheet music, in music conveyed by radio. Not only that, but it has come into equity, asking injunctive aid to enable it to perpetuate these same restraints.

#### **Public Policy Demands That the Court Give No Aid to Plaintiffs in the Present Suit**

The principle for which defendants contend is

based on the maxim that "he who comes into equity must come with clean hands." The situation here fits the limitation of the rule as stated in 1 *Pom. Eq. Jur.* (3rd Ed.) Sec. 399:

"The maxim, considered as a general rule controlling the administration of equitable relief in particular controversies, is confined to misconduct in regard to, or at all events connected with, the matter in litigation, so that it has in some measure affected the equitable relations subsisting between the two parties, and arising out of the transaction; it does not extend to any misconduct, however gross, which is unconnected with the matter in litigation, and with which the opposite party has no concern."

It is freely conceded that even those attempting to perpetuate a monopoly do not thereby become general outlaws to such extent that such monopolistic combinations may not recover on contracts which do not form a part of the monopolistic plan. In the case at bar, however, it is self-evident that the relief sought is for the express purpose of perpetuating the monopolistic plan under which the plaintiffs now operate. In fact the bill has no other object. Far from disputing this statement, plaintiffs asserted in their brief (p. 22) filed in the lower court in support of their motion for a preliminary injunction:

"In the case at bar the injury to the collective rights of the complainants is undisputed, certain and inevitable. *The Society must abandon all its contracts with its licensees in the State because they are expressly declared unlawful and are nullified by Sections 3 of the Statute.*"

Defendants have urged since the inception of this litigation that a court of equity ought not lend its aid to these plaintiffs in the furtherance of their monopolistic practices, but the court below disregarded defendants' contentions. Yet, in a similar case before a specially constituted three-judge Federal Court in the District Court of the United States for the Western District of Washington wherein the same plaintiffs brought an action against State officials (*Buck v. Gallagher*) to enjoin the enforcement of the statute enacted by the Legislature of Washington, the Court on December 24, 1940 dismissed plaintiffs' action on the express grounds that plaintiffs constituted a combination in violation of the Sherman Anti-Trust Law and, as such had no standing in a court of equity. This decision is as yet unreported, but copies of the opinion, findings and decree are attached as Appendices "C-1", "C-2" and "C-3".

The equitable maxim is directly applicable to one who invokes the aid of a court of equity in enforcing or protecting an agreement in unreasonable restraint of trade or tending to monopoly. 1 *Pom. Eq. Jur.* (3rd Ed.) Sec. 402, citing:

*American Biscuit Co. v. Klotz*, 44 F. 721;  
*Pacific Costal Tel. Cable Co. v Western Union Tel. Co.* 50 F. 493;  
*Chicago Gas Light Co. v. Gas Light Co.* 121, Ill. 530,

In *American Biscuit & Mfg. Co. v. Klotz*, *supra*, Klotz had sold his bakery in New Orleans to American Biscuit Co., in exchange for stock of the Biscuit Company. Under the agreement Klotz became manager of the plant. Charg-

ing that certain frauds had been perpetrated upon him with regard to the stock paid for his sale of the plant, Klotz repudiated the contract and held possession of the bakery adversely to the Biscuit Company. The Biscuit Company brought suit for injunction and receiver. Klotz defended by answer and cross bill asking for rescission of the contract.

After announcing that the equities for the appointment of a receiver under such circumstances ordinarily would be with the plaintiff, the Court declined to do so (p. 723) because of:

"\* \* \* an aspect of the case originally suggested by the defendant, when the case was pending in the state court, apparently abandoned here, but sufficiently brought to our notice by the exhibits of both parties."

The court then pointed out that the evidence disclosed an "attempt to monopolize" within the meaning of the Federal and Louisiana statutes against monopolies (p. 725), and that:

"Aside from this, the complainant's business, even if lawful, being of the kind shown above, is not of that meritorious kind that it should be encouraged by a court of equity. The appointment of a receiver by a court of equity is not a matter of strict right but of judicial discretion."

Because of these considerations the Court denied the appointment of a receiver.

This case was never appealed, but it has been frequently cited, and in *McConnell v. Camors-McConnell Co.* (CCA

5, 1907), 152 F. 321, the syllabus of the Klotz case is quoted and the holding followed.

In the McConnell case, *supra*, the Circuit Court of Appeals denied to the plaintiff (a subsidiary of United Fruit Co.) the right to judicial aid in enforcing a contract, the purpose of which was to further a monopoly of foreign commerce in tropical fruits. In a strongly worded opinion by Circuit Judge McCormick, the Court said (p. 332):

"The State may and will bring, in its courts, actions and suits to enforce its statute laws and its public policy against them, when necessity requires, to the extent that time and opportunity permit. But the harvest is great, the laborers are few, and time is short. These parties are wonderfully strong. Age does not impair their strength. They perennially recruit it from the highest ranks of the legal profession, with veteran experts in strategy and tactics, both grand and elementary. There are necessary delays in litigation, inherent weaknesses in its best machinery, obstructions will supervene, and all these elements are capitalized to the last extent of their earning capacity, by these highly organized unnatural persons, who decide and act with the promptness and prescience of the most superior human intellect. Direct proceedings by the state are overtaxed. *The courts, especially the courts of equity, should not pose always as the fabled goddess, but keep an eye single to these exigent conditions and aid the state, as they rightly may, by withholding help or grace from graceless and hurtful dealings.*"

In *Continental Wall Paper Co. v. Lewis Voight & Sons Co.* (CCA 6, 1906) 148 F. 939, plaintiff sued for money due for wall paper sold and delivered to defendants. The appeal was based on the action of the trial court in sustaining against demurrer a special defense that the goods sued for were sold to it under certain agreements in aid of restraint of trade. In sustaining the ruling of the lower court, the opinion by Judge Lurton, later Mr. Justice Lurton of this Court, said (p. 950):

"The defense which we sustain here is not for the sake of William Voight & Sons. The averment that they paid 50 per cent more for their gross purchases in consequence of the illegal combination has little merit in it, moral or otherwise. They doubtless sold again at the great minimum profit they agreed to exact from retailers, and the retailers later exacted the undue profit from the consuming public. There, at last, like all burdens, it must rest. *The defense here sustained is good only because it is only possible to protect the public by refusing all assistance in carrying out an illegal agreement.*"

This decision of the Circuit Court of Appeals was affirmed by this Court, 212 U. S. 227. The Court, speaking through Mr. Justice Harlan, said (p. 262):

**"In such cases the aid of the court is denied, not for the benefit of the defendant, but because public policy demands that it should be denied without regard to the interests of individual parties."**

To like effect see *Chicago, M. & St. P. Co. v. Wabash, St. L. & P. Ry Co.* (C. C. A. 8, 1894), 61 F. 993.

In *McMullen v. Hoffman*, 174 U. S. 639, two bidders for a municipal contract had secretly agreed that while ostensibly putting in separate bids, if either were awarded the contract, its benefits should be shared equally between them.

The suit was for an accounting against the successful bidder after he had declined to pay his confederate the latter's alleged share of the profits. After a full analysis of the facts and authorities bearing on the subject, this Court held that the cause of action, arising as it did out of a contract in restraint of trade, could not give rise to any enforceable rights in favor of the plaintiff.

Therefore, the application of the "clean hands" maxim to plaintiffs who have so misused their copyright monopoly should appeal with great force to the equitable discretion of the Court.

**II. THE PROVISIONS OF THE 1937 ACT WERE SEVERABLE, AND THE COURT SHOULD NOT HAVE STRUCK DOWN THE WHOLE ACT MERELY BECAUSE IT FOUND CERTAIN SECTIONS VOID.**

The lower court held Sections 2-A, 2-B, 4-A, 4-B, 5-A, 5-B and 6 unconstitutional, and that because these sections were not severable from the main provisions of the

Act, the constitutionality of which was not discussed, the whole act was void.\*

The court declared the Act inseparable despite Section 12, which provides as follows:

"Section 12. If any section, subsection, sentence, clause or any part of this Act, is for any reason, held or declared to be unconstitutional, inoperative or void, such holding or invalidity shall not affect the remaining portions of this Act; and it shall be construed to have been the legislative intent to pass this Act without such unconstitutional, inoperative or invalid part therein; and, the remainder of this Act, after the exclusion of such part or parts, shall be held and deemed to be valid as if such excluded parts had not been included therein."

In defining the effect of such a provision, the Supreme Court of Florida, in the case of *Liggett Co., vs. Lee*, 109 Fla. 477, said:

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\*NOTE: There is considerable doubt as to what the Court really held as to Section 3 of the Act, due to the following language in the opinion (R. 1100): "We find Sections 3, 4-A, 4-B, 5-A, 5-B and 6 also invalid. There remains: Sections 1, 2-C and 3, et seq." Section 3 invalidated all existing contracts made with any combination declared unlawful under Section 1 of the Act. The court must have inadvertently declared Section 3 invalid *per se*—if it did so at all—because there is no question as to the validity of such a provision. See: *Atlantic Coast Line R. R. Co. v. Goldsboro*, 232 U. S. 548; *New Orleans Gas Light Co. v. Louisiana Light Co.*, 115 U. S. 656; *Union Dry Goods Co. v. Georgia Public Service Corp.*, 248 U. S. 372; *Stephenson v. Binford*, 237 U. S. 251, 276; *Homes Building & Loan Association v. Blasdel*, 239 U. S. 298, 424-5.

At any rate the validity of Section 3 would seem now to be moot, as all license agreements in existence at the date of enactment of the 1937 Act expired Dec. 31, 1940 (R. 33, 70).

"Such legislative declarations as are contained in section 15 serve notice on the courts of a legislative intent to uphold separable portions of an act partially invalid which would have been eliminated in passage if the Legislature had been advised of the invalidity. The test to determine workability after severance, and whether the remainder of the act should be upheld, rests on the fact of whether or not the invalid portion is of such import that the valid part would be incomplete or would cause results not contemplated by Legislature. If the objectionable part of the act can be severed in such a way that the Legislature would be presumed to have enacted the valid portion without the invalid part, the failure of the latter will not render the entire statute invalid."

The effect of such a provision under the decisions of this Court is:

That such a saving clause creates a presumption of separability; that this presumption must be overcome by considerations which establish the clear probability that the Legislature would not have been satisfied with the statute unless it had included the invalid part.

See: *Charles C. Steward Machine Co. v. Davis*, 301 U. S. 548.

*Carter v. Carter Coal Co.*, 298 U. S. 238.

When these rules are applied to the statute in question, it becomes clear that the Court was in error in declaring this statute inseparable.

As will be hereinafter demonstrated, the principal and fundamental purpose of the Act was to prevent the operation in this state of price-fixing monopolistic combinations dealing in performing rights of copyrighted music. This purpose is expressed in the sections not per se found invalid by the Court, while the purpose of 2-A, 2-B and 6, allowing copyrighted music to be used without compensation under certain circumstances is wholly foreign to the anti-monopoly provisions of the Act. The purpose of 4-A, 4-B, 5-A, 5-B is merely to add additional deterrents to the operation of such combinations in Florida, and is only in a trivial and subordinate sense supplementary to the broad purpose as declared in Section 1 of the Act.

Sections 2-A, 2-B and 6 are clearly separable because:

- (1) They were repealed by Chapter 19653 Laws of Florida, 1939; thus the Legislature itself separated those sections from the remainder of the Act.
- (2) Defendants have no duties to perform with regard to them;
- (3) They are wholly unrelated to the anti-monopoly sections of the Act.

Section 15 of the 1939 Act provided for the repeal of all inconsistent acts and further provided:

✓ "Provided, however, nothing in this Act shall be construed to repeal, supersede or modify any of the statutes of the State of Florida pertaining to monopoly or restraint of trade, including but not limiting the generalities of the foregoing Sec-

tions 1, 2-C, 3, 4, 5, 7, 8, 9, 10, 11, 12, 13 and 14 of Chapter 17807, Laws of Florida, 1937."

Sections 2-A, 2-B and 6 were omitted in listing the portions of the 1937 Act kept in force by the above-quoted proviso of the 1939 Act, therefore they fall within the repealing clause of Section 15. This becomes doubly evident upon comparison of these three sections (App. "A") with Section 4-A and other sections of the 1939 Act (App. "B") which provide a different system for licensing public performance rights.

Section 2-A required that there should be placed upon every musical composition (i. e., such as sheet music, phonograph records, etc.) a selling price "determined for all uses and purposes"; that when the purchaser acquired the same within the State of Florida and paid the specified selling price, then the purchaser, *ipso facto*, acquired the right of public performance of that piece of music through any medium he might wish to use, without further license fee.

Section 2-B provided that if the price was not placed upon the musical composition, then the purchaser might use it for public performance for profit without further license fee. In other words, considering these two sections of the 1937 act together, the selling price at the time of the original sale of the physical piece of sheet music or record, whether or not specified thereon as provided in Section 2-A, carried with it full public performance rights. Hence the copyright owner, by these sections, was divested of the performing rights by sale of the sheet music or record, and thereafter he had no performing rights to license to that purchaser, either acting alone or in concert with other copyright owners.

On the contrary, Section 4-A of the 1939 act authorizes blanket performing licenses apart from sale of sheet music or records, even by combinations of two or more copyright owners, provided only, in the case of a combination of owners, that the licensee is given the option to acquire all or such portion of the "pooled" performing rights as he desires, at prices fixed on a "per-use" basis by the respective copyright owners. Thus the method of licensing public performances under Section 4-A of the 1939 Act is an entirely different system from that formerly required by Sections 2-A and 2-B of the first act whereby the licensing for public performances was acquired by payment for the sheet music or record. The two systems are incompatible.

The inconsistency of the 1939 statute and Sections 2-A and 2-B of the prior act is further shown by the reference to blanket licenses and to program licenses contained in Sections 4-B and 4-C of the 1939 Act, neither of which is compatible with Sections 2-A and 2-B of the 1937 Act.

Section 6 of the 1937 Act is likewise wholly inconsistent with provisions of the 1939 Act. Section 6 provided, in substance, for collection at the source of all license fees for music emanating outside the state. Thus, for instance, in the case of a national chain hookup, the national chain from which the music emanated would have to pay the entire license fee, leaving the local broadcaster free of any license fee for the use of the music. It requires no argument to demonstrate the incompatibility of that provision with the permission given by Section 4-A and related sections of the 1939 Act to collect license fees from users in the State of Florida, whether or not rebroadcasted in Florida by connection with a national hookup.

Further, Section 8 of the 1939 Act makes it unlawful for any person without the consent of the copyright owner to perform any musical composition publicly, provided the owner has complied with the provisions of the act. If, therefore, the copyright owner has listed his music as provided in Section 2 of the 1939 Act, even if he never combines with any other copyright owner so as to bring him within the provisions of Section 4-A, still, by Section 8, it becomes unlawful for a user of music in Florida to perform music for profit without the owner's consent.

For these reasons, in addition to the specific omission of Sections 2-A, 2-B and 6 in the saving clause of the 1939 Act, the legislature plainly intended to repeal, and did repeal these three sections.

Even had they not been repealed by the 1939 Act, still they present only moot questions in the instant case. *No duty is laid upon the defendant state officers to enforce these sections.* Their duties are limited by Section 9 to prosecutions of combinations under Section 1, and Mr. Justice Black so held in his minority opinion when this case was previously before the Court (307 U. S. 79). Any litigation which could arise under them, 2-A, 2-B or 6, of the 1937 Act, would involve only private rights between the copyright owners and users of the music. No music users are parties to this suit. In recognition of that fact, at the final hearing of the case and at the October hearing, the Attorney General expressly disclaimed on the part of the state enforcement officers any duty or intention to enforce the three sections mentioned.

The fundamental purpose of the 1937 Act was to prohibit price-fixing monopolies dealing in performing rights of copyrighted music from operating in this State. Sec-

tions 2-A, 2-B and 6, in no way relate to that subject; they affect and apply to all owners of performance rights of copyrighted music, regardless of whether or not they are members of any price-fixing combination. This separability of application surely denotes the severability of these sections from the remaining portions of the Act.

Thus, we have two legislative declarations that the 1937 Act should be held by the Courts to be severable and an analysis of these sections demonstrates that they have a separate, distinct and entirely independent purpose from the remaining sections of the Act. Surely, the Court was in error in declaring the whole act void, merely because these sections were void.

The constitutionality of Sections 4-A, 4-B, 5-A and 5-B will not be argued at this point in the brief, but only their severability from the main anti-monopoly provisions of the Act.

Section 4-A relieves Florida broadcasting stations from payment of license fee for rebroadcasts of copyrighted music controlled by combinations prohibited by Section 1. Section 4-B similarly forbids collection by out-of-state stations of license fees for unlawful combinations. Sections 5-A and 5-B are exact counter-parts of Section 4-A and 4-B, except that they relate to theaters and places other than radio stations performing copyrighted music for profit. It is plain from these sections of the statute that they are additional deterrents or added punishment to combinations prohibited by Section 1; they are only in a trivial manner connected with the broad fundamental purpose of Section 1, which was to prohibit price-fixing combinations in this state; they only have a subordinate

purpose and surely, if they are unconstitutional, the saving clause in the Act would cause the residue to stand.

See: *Highland Farm Dairy v. Agnew*, 300 U. S. 608, 614, where this Court said:

"Moreover, if a provision so subordinate were at any time to fail, the saving clause in Section 16 would cause the residue to stand."

The lower court, in its opinion (R. 1101) characterized these sections of the Act, viz. 2-A, 2-B, 4-A, 4-B, 5-A, 5-B and 6, as the "without pay" sections. This manner of describing them itself implies that they had a separate and distinct purpose from Sections 1, 3, 7, 8, 9, 11, 12, 13 and 14 of the Act, which constitute the anti-monopoly and enforcement provisions of the statute.

Thus, the District Court, itself, recognized that the Act had two separate, severable, independent and distinct purposes—the fundamental purpose being to make unlawful and prohibit the operation in this state of price-fixing combinations dealing in copyrighted music; the other being to allow users of copyrighted music for profit under certain specified conditions to use music without paying for it. If the "without pay" sections are stricken, we have a complete workable anti-monopoly statute independent of the other sections remaining, which was certainly the fundamental purpose of this Act contemplated by the Legislature. If the Legislature had intended—as was held below—to make the Act stand or fall in its entirety, it was a useless gesture to place the severability clause in the 1937 Act, or to save from repeal all except Sections 2-A, 2-B and 6 by the repealing clause in the 1939 Act. When this legislative declaration is considered together

with the fundamental purposes of the sections of the Act, not *per se* declared void, and the fact that the sections declared *per se* void, have separate and distinct purposes from the other sections, it indicates that the legislative intent was to pass an anti-monopoly statute, regardless of the sections which the Court declared *per se* void. And when this intent is considered, together with the presumption of severability created by the insertion of the saving clause therein, it is manifest that the Court erred in declaring the whole statute void because it found that certain sections unrelated to the main purpose of the Act were invalid.

Apply the test prescribed by this Court in *Carter v. Carter Coal Company*, *supra*:

Suppose while the bill was pending before the Legislature, a motion to strike sections 2-A, 2-B, 4-A, 4-B, 5-A, 5-B and 6 had prevailed. Since most of these sections did not relate to the main purpose of the Act at all—and those that do, only in a subordinate and unimportant way—it is illogical to assume that the Legislature would have refused to pass that part of the statute which protects the people of the State of Florida from the activities of price-fixing monopolies merely because it was unable to also enact the "without pay" sections. Especially is this true in view of the presumption of severability which must be applied to the statute.

**III. SECTION 1 OF THE 1937 STATUTE AND ITS DEPENDENT SECTIONS, (3, 4-A, 4-B, 5-A, 5-B, 7-A, 7-B, 8 and 9) REPRESENT A VALID EXERCISE OF THE POLICE POWER OF THE STATE OF FLORIDA IN THE PREVENTION OF MONOPOLY AND RESTRAINT OF TRADE.**

As shown above, the District Court did not hold the anti-monopoly provisions of the 1937 Act invalid *per se*, but struck them down because it considered them inseparable from other provisions of the statute which it declared unconstitutional. In fact, the power of the State reasonably to regulate the use of copyrights within its borders was expressly recognized in the lower court's opinion (K. 1098, 1102).

Nevertheless, defendants do not rest merely upon the implication that these anti-monopoly provisions are *per se* valid, and instead will meet squarely the attack made by plaintiffs below.

**SECTION 1.** This section strikes the keynote of the whole statute. It declares unlawful any combinations of authors, composers, publishers, or owners of copyrighted music, constituting a substantial number of persons owning such copyrighted compositions in the United States—if the object of such combination is to declare or fix license fees or other compensation for the use or rendition of copyrighted music for public performance for profit.

It forbids the collection of license fees fixed by such combination from any person, firm or corporation within the State of Florida, including radio broadcasting stations, theatres, moving picture houses, hotels, restaurants, clubs, dance halls, et cetera; forbids the collection of such license fees in any court within the State; makes any such

collection or attempted collection a separate offense; denounces such price-fixing as in restraint of trade, and declares the collection or attempted collection to be an intra-state transaction.

Sections 3, 4-A, 4-B, 5-A, 5-B, 7-A, 7-B, 8 and 9 are all by express language made dependent upon Section 1, that is to say that those sections are made operative only with respect to unlawful combinations as defined in Section 1. If the Legislature did not have power to enact Section 1, the nine sections above mentioned would necessarily fall with it. Therefore, it is unnecessary to analyze the provisions of these dependent sections in this portion of the brief, especially as the entire text of the statute is available in Appendix "A."

We do not understand that plaintiffs contend the State of Florida lacks in general the power to regulate restraints of trade. That has been settled by repeated decisions.

*Waters-Pierce Oil Co. v. Texas* (No. 1), 212 U. S. 86, 107;

*International Harvester Co. v. Missouri*, 234 U. S. 199, 209;

*Great Atlantic & Pacific Tea Co. v. Grosjean*, 301 U. S. 412, 425-6;

*Nebbia v. New York*, 291 U. S. 502, 529;

*National Cotton Oil Co. v. Texas*, 197 U. S. 115, 129;

*Puerto Rico v. Shell Co.*, 302 U. S. 253, 260-1;

*Central Lumber Co. v. South Dakota*, 226 U. S. 157, 161.

Rather, it seems to be plaintiffs' contention that because of the fact that federal copyrights are created by an Act of Congress, no state legislature is competent to prescribe any regulation concerning them.

That contention is untenable. To assert it is to overlook the fact that Congress, acting under Article I, Section 8 of the Federal Constitution, merely created a new statutory property right in the respective owners of literary and musical works which remained subject to state police power, like other property. Neither the Federal Constitution nor Congress has ever bestowed upon the holders of copyrights any right to combine for price-fixing purposes.

The Constitution simply provides: (Art. I, Sec. 8, Cl. 8): Cl. 8):

"The Congress shall have power . . . to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their **respective** writings and discoveries."

Congress, if it could do so, has never attempted to extend the constitutional grant by conferring any rights upon patent or copyright owners to act in concert for any purpose, much less price-fixing. Where Congress, in exercising a constitutional power, has not shown an intention to cover the field completely, a state is free to act.

*Carey v. South Dakota*, 250 U. S. 118, 122;

*Savage v. Jones*, 225 U. S. 501, 533;

*M. K. & T. Ry Co. v. Haber*, 169 U. S. 613, 623.

Congress has not extended its legislation into the field of regulating commercial transactions representing contracts to license or sell patent or copyright rights. And so it was held that a suit based on a contract for the sale of a patent is not one "arising under the patent laws of the United States."

*Albright v. Teas.*, 106, U. S. 613.

By repeated decisions of this Court, it is settled that a state in the exercise of the police power may enact reasonable regulations affecting commercial dealings in patents and copyrights within its borders:

*Allen v. Riley*, 203 U. S. 347;  
*Patterson v. Kentucky*, 97 U. S. 501;  
*John Woods & Sons v. Carl*, 203 U. S. 358;  
*Ozan Lumber Co. v. Union County Nat. Bank*,  
207 U. S. 251;  
*Carbico Corp. v. American Patents Corp.*, 283  
*Fox Film Corp. v. Doyal*, 286 U. S. 123.

In *Allen v. Riley*, *supra*, it was held that a state has the power, at least, until Congress legislates on the subject, to make such reasonable regulations in regard to the transfer of patent rights as will protect its citizens against fraud; and a requirement of the Kansas statute that before the sale or barter of a patent right, an authenticated copy of the letters patent and the authority of the vendor to sell the right patented shall be filed in the office of the clerk of each county within which the rights are intended to be sold, is not an unreasonable regulation.

The Court said (203 U. S. 356, 357):

"\* \* \* Possibly Congress might enact a statute

which would take away from the States any power to legislate upon the subject, but it has not as yet done so. It has simply provided that every patent, or interest therein, shall be assignable in writing, leaving to the various states the power to provide for the safeguarding of the interests of those dealing with the assumed owner of a patent, or his assignee. To deal with that subject has been the purpose of the acts passed by the various States, among them that of the State of Kansas, and we think that it was within the powers of the State to enact such statute."

In *Patterson v. Kentucky*, *supra*, the Court held that the State might constitutionally prohibit the sale of dangerous oils, even when manufactured under a patent from the United States, saying in part (97 U. S. 506):

"\* \* \* the right which the patentee or his assignee possesses in the property, created by the application of a patented discovery, must be enjoyed subject to the complete and salutary power with which the States have never parted, of so defining and regulating the sale and use of property within their respective limits as to afford protection to the many against the injurious conduct of the few."

Can it be thought that the power of a state to protect its citizens against the formidable iniquities of price-fixing combinations is any less potent than its power to protect them against fraud (*Allen v. Riley*), or against physical injury (*Patterson v. Kentucky*)?

Copyright owners and patent owners are protected by

the same clause of the Federal Constitution, and under language which places them upon a complete parity. Thus, patent decisions herein cited are equally applicable to copyrights. (So held in *Straus v. American Publishers Ass'n, supra.*)

Not only has Congress not attempted to bestow upon copyright owners any right to combine their copyrights for price-fixing purposes, but this Court has expressly recognized the fact that patents and copyrights are no more than other kinds of property immune from anti-monopoly legislation.

In *Standard Sanitary Manufacturing Co. v. United States*, 226 U. S. 20, 49, it is stated:

"\* \* \* Rights conferred by patents are indeed very definite and extensive, but they do not give any more than other rights an universal license against positive prohibitions. The Sherman Law is a limitation of rights, rights which may be pushed to evil consequences and therefore restrained."

And in *Straus v. American Publishers Ass'n* 231 U. S. 222, 234, 235:

"So, in the present case, it cannot be successfully contended that the monopoly of a copyright is in this respect any more extensive than that secured under the patent law. *No more than the patent statute was the copyright act intended to authorize agreements in unlawful restraint of trade and tending to monopoly*, in violation of the specific terms of the Sherman Law, which is broadly designed to reach all combinations in un-

lawful restraint of trade and tending because of the agreements or combinations entered into, to build up and perpetuate monopolies."

To like effect, see *Virtue v. Creamery Package Mfg. Co.*, 227 U. S. 8, 32; *National Harrow Co. v. Hench*, 83 F. 36, 38.

In *United Shoe Machinery Co. v. United States*, 258 U. S. 451, a case under the Clayton Act, the Supreme Court expressly recognized the right of a state to exercise its police power in the field of regulation of the use of patents.

As said by Mr. Justice Brandeis in *Standard Oil Co. (Ind.) v. United States*, 283 U. S. 163, 174:

"\* \* \* \* The lawful individual monopolies granted by the patent statutes cannot be unitedly exercised to restrain competition.

A recent pronouncement of this Court on this subject is *Interstate Circuit v. United States*, 306 U. S. 208, holding that the owners of copyrighted motion picture films could not lawfully by concerted action use their copyrights to restrain competition.

But it is said by plaintiffs that in order to invoke the police power of the state, there must be an evil to curb; that in this case there was no "evil" because the result of the Society's operations is good. Consequently, they assert, the legislation was not "enacted in the public interest." This Court will not be interested in weighing the charges made by plaintiffs in their effort to impugn the motives of the legislature in enacting the statute. As was said in *Southwestern Oil Co. v. Texas*, 217 U. S. 114, 126:

"But we will not speculate as to the motives of the state, and will assume—the statute, neither upon its face or by its necessary operation, not suggesting a contrary assumption—that the state has in good faith sought, by its legislation, to protect or promote the interests of its people."

In *Merrick v. N. W. Halsey & Co.* 242 U. S. 568, the "Blue Sky" Law of the State of Michigan was under attack. A part of the attack on the statute was that the business to which it applied "neither requires nor justified, nor is susceptible of, administrative or executive control for the purpose of preventing a wrong or injury by one individual to another." (p. 585.) The Court said (p. 585, 586):

"\* \* \* it is for the state to judge in such circumstances, and the judgment and its execution would have to be palpably arbitrary to justify the interference of the courts."

"\* \* \* we cannot stay the hands of government upon a consideration of the impolicy of its legislation." (p. 586.)

"*Engel v. O'Malley*, 219 U. S. 128, 55 L. Ed. 128, 31 Sup. Ct. Rep. 190, was not decided because fraud was incidental to the business of banking by individuals or partnerships, but because fraud could be practiced in it, and hence it could be licensed. Nor was it decided in *Allen v. Riley*, 203 U. S. 347, 51 L. Ed. 216, 27 Sup. Ct. Rep. 95, 8 Ann. Cas. 137, that the transfer of patent rights was of itself illegal, or that any particular transfer would be deceptive, but that some transfers

might be; and so a statute of Kansas which required any person selling or offering to sell such rights to conform to certain requirements was declared valid." (p. 588.)

In this case the legislature was acting to curb a "known evil" (*Allen v. Riley*, *supra*), namely, the price-fixing practices prevailing in the licensing of copyrighted music for profit which are fully set forth in Point 1 of this brief.

The power of a state to enact such legislation is also squarely presented in the case of *Buck v. Swanson*, 33 F. Supp. 377 which has been set for hearing on appeal at the same time the instant case is argued. In that case the 3-judge court in Nebraska stated that the legislature of that State did have power to prohibit monopolistic practices in the licensing of performance rights in copyrighted music, and found that such practices were actually in operation. It held, however, just as did the District Court in the case at bar, that the statute was inseparable and for that reason only, it struck down the entire statute.

 The anti-monopoly sections under the 1937 Florida Statute place no restriction whatever upon the right of the individual copyright owner to do as he likes with his copyright. He may grant or withhold licenses for public performances at will, and if he grants them may impose whatever terms he sees fit. And so these regulations are entirely in harmony with the federal constitution which merely directs Congress to secure "to authors \* \* \* the exclusive right to their respective writings" (*Const. Art. I, Sec. 8, Cl. 8*).

#### IV. SECTION 4-A OF THE 1939 ACT CONSTITUTES A VALID REGULATION OF PRICE FIXING COMBINATIONS.

Section 4-A declares unlawful combinations of "two or more owners" of musical or dramatico-musical copyrights for purpose of issuing blanket public performance licenses, *unless* such combinations file with the Comptroller either as part of the list under Section 2 or separately a schedule of prices for the performing rights for each separate performance (or per piece), with affidavit that such price was fixed by the copyright-owner alone and not in combination with other owners—with provision for reasonable classification by uses if without unreasonable discrimination; and for filing new schedules at any time effective seven days from filing, and for public inspection of schedules.

There is a definite line of demarcation between this Section of the 1939 Act and Section 1 of the 1937 Act. Section 1 of the 1937 Act attached its prohibition only to combinations of "a substantial number" while Section 4-A of the 1939 Act attaches its prohibition to combinations of "two or more." However, in as much as Section 1 of the 1937 statute was expressly preserved in effect by Section 15 of the 1939 Act, it is readily seen that the permission granted by Section 4-A to combine extends only up to the point where the "two or more" constitutes "a substantial number." If they do constitute a substantial number, the permission is withdrawn and the combination falls under the denunciation of Section 1 of the 1937 Act.

But with that limitation, Section 4-A is an anti-monopoly provision, in just as real a use of the term as is Section 1 of the 1937 law; and like the earlier statute it

strikes directly at price-fixing. The restraint is imposed upon the owners who combine "for the purpose of issuing blanket licenses \* \* \* upon a blanket royalty or fee covering more than one, or all of such compositions," and unless that purpose is present the section does not apply.

The correctness of this interpretation is corroborated by the definition of the terms "blanket license" and "blanket royalty or fee" contained in Section 1 of the 1939 Act.

The fact that Section 4-A is an anti-price-fixing provision was completely overlooked by the District Court. In its conclusions of law (R. 1091) it found that Section 4-A was invalid "as an arbitrary interference with liberty of contract and with the rights granted under the copyright laws." Its opinion says (R. 1102-1103):

*"Section 4-A does not concern itself with price fixing or with combinations for price fixing; it deals only with the Act of pooling copyrighted pieces to sell them for one royalty, that is, with the selling of two or more pieces under one license. There is no conceivable public policy against such action by two or more owners and therefore no valid exercise of police power involved in a statute putting limitations on such trading. So long as persons do not unlawfully combine to fix prices, and the section in question does not deal with such unlawful combinations, there is no offense in mere pooling. And the mere fact that the statute permits to be done what without the statute it was already lawful to do does not authorize it to impose unconstitu-*

tional restrictions upon that doing. 'But a state may not impose any condition which requires the relinquishment of a right guaranteed by the constitution.' *Sage v. Baldwin*, 55 Fed. (2d) at 969."

This fundamental misconception was undoubtedly the occasion for the striking down of the section by the District Court.

(1) In the regulation of restraints of trade within its territory there is no doubt of the power of the state to prohibit a combination of "two or more" for price-fixing purposes.

Many, if not most, of the state statutes dealing with this subject do prohibit combinations of "two or more persons" and in our study of the subject we do not find that any of these statutes have been invalidated for that reason.

Section 1 of the Kansas Anti-Monopoly Act of March 8, 1897, forbade combinations of two or more persons for the carrying out of restrictions to trade or commerce. A combination of five buyers of wheat in Rush County, Kansas, to fix the purchase price at which the grain was bought were convicted, and the conviction was upheld in *State v. Smiley*, 65 Kan. 240. The decision of the Kansas Supreme Court was upheld by this Court in *Smiley v. Kansas*, 196 U. S. 447. In the course of its opinion the Kansas Court quoted from *United States v. E. C. Knight Co.*, 156 U. S. 1, 16, to the following effect:

"\* \* \* in order to vitiate a contract or combination it is not essential that the result should be the complete monopoly; it is sufficient if it really tends to that end, and deprive the public of the advantages which flow from free competition."

And in *Grenada Lumber Company v. Mississippi*, 217 U. S. 433, a Mississippi anti-trust act was upheld which defined "trust and combine" as a "combination, contract, understanding or agreement between two or more persons \* \* \* in restraint of trade."

(2) Having the power to prohibit completely such price-fixing combinations, the legislature may subject them to lesser regulation, *Old Dearborn Distributing Co. v. Seagram Distilleries Corp.*, 299 U. S. 186.

That is exactly what the Florida Legislature did in Section 4-A, where it permitted combinations not large enough to fall under the ban of Section 1 of the 1937 Act to operate, provided the proposed licensee was given the option to take a license on a per piece basis from each of the individual copyright owners in the combination, at prices fixed by the individual owner.

(3) It is an axiomatic principle of constitutional law that no one is privileged to attack a statute on grounds that do not affect him. That principle has been recognized so often by this Court as to render citation of authority unnecessary. Among the many cases so holding is *Smiley v. Kansas*, *supra*, which quoted with approval a pronouncement of the Supreme Court of Kansas on that subject.

Plaintiffs in the instant case, for that reason, are disqualified to complain of Section 4-A. Under Point 1 of this brief it is fully demonstrated that the plaintiff Society is composed of "a substantial number" of authors, composers, publishers, and owners of copyrighted musical compositions"—to such an extent in fact as to give the

Society the power to dominate the business of licensing the performance of such compositions for profit. Thus, plaintiffs are of such size as to fall under the prohibitory provisions of Section 1 of the 1937 Act, and are in no position to avail themselves of the qualified permission to combine contained in Section 4-A of the 1939 Act.

For these reasons it is clear that the District Court erred in invalidating Section 4-A.

**V. SECTION 4-C OF THE 1939 STATUTE IS NOT INVALID  
BECAUSE IT LIMITS COMPENSATION FOR LICENSING  
THE USE OF MUSICAL COPYRIGHTS TO PROGRAMS  
ACTUALLY USING THE LICENSED MUSIC.**

Section 4-C of the 1939 Act forbids the collection of compensation for the use of musical performing rights if it is based in whole or in part upon programs not containing the music charged for. There is no doubt of the fact that it vitally affects the plaintiff Society's present mode of doing business, since none of its licenses are based upon payment for the music actually used. (R. 70, 74, 75.)

The District Court found Section 4-C bad, saying (R. 1103):

"It undertakes to impose unreasonable restrictions on copyright owners, restrictions having no reasonable relation to the public policy the Act is designed to further, that of disclosure for the protection of the public against fraud \* \* \* The prohibition of the section against basing the price upon programs in which a particular piece of music is not performed is a completely arbitrary one and as such, it could not stand if the subject

of the prohibitions were unprotected by copyright."

The Court then went on to say (R. 1104) that a similar restriction on a contract for the hire of a horse, car or a boat would be invalid "as an invasion of the right and liberty of contract."

(1) In so holding, the lower court completely overlooked the fact that the public entertainment business has reached a stage of nationwide development which affects it with a public interest. (*Motion Picture Patents Co. v. Universal Film Co., supra*, pp. 502, 517.)

The public has an interest in leaving that business free to devise the best and most practicable programs available, without the burden of licensing fees based upon the proportion of gross receipts such as the Society now enforces. The inevitable effect of a flat percentage charge on gross receipts is to force the industry to use to the maximum the music of the licensor charging the flat percentage fee, because it costs it nothing, except what the licensee is already obligated to pay; whereas, to use the music of other copyright owners, even though it might be of a superior quality and cultural value, or to use non-musical material, would necessitate the payment of additional expense, thereby lessening the net income of the business.

Viewed in this light, Section 4-C is, in substance, merely a regulation to promote healthy competition among holders of musical copyrights and all possessors of material suited to public entertainment, whether musical or not. In effect, the percentage levied by the Society on gross receipts forces music users into involuntary partnership

with the copyright owners, who have no direct interest in serving the public. In so doing, it deprives non-member publishers, composers and authors of a market for their performance rights, and thus stifles competition.

(2) Section 4-C takes no property and impairs no right given by the copyright law.

The right which a copyright holder has is that of excluding others from making, using, or vending the copyrighted composition without his permission, but as to compensation therefor, the property right is less extensive than the common law property right in a horse or other chattel. This is because of the nature of the statutory right which is dependent upon its constitutional origin.

The Constitution gave Congress power only to secure to authors and inventors the exclusive right to "their respective writings and discoveries." (Art. I, Sec. 8, Cl. 8.)

The right to charge for use of a copyright or patent, as defined by the Supreme Court, does not embrace a right to compensation for the use of *other* than the protected work or invention. The principle recently has been reiterated by this Court in *Ethyl Gasoline Corp. v. United States*, 309 U. S. 436, 456, as follows:

"The patent law confers on the patentee a limited monopoly, the right or power to exclude all others from manufacturing, using or selling his invention. R. S. 4884, 35 U. S. C. S. 40, 35 U. S. C. A. S. 40. The extent of that right is limited by the definition of his invention, as its boundaries are marked by the specifications and claims of the patent. *Motion Pictures Patents Co. v. Universal Film Mfg. Co.*, 243 U. S. 502, 510.

"He may not, by virtue of his patent, condition his license so as to tie to the use of the patented device or process the use of other devices, processes or material which lie outside of the monopoly of the patent licensed, \* \* \* or condition the license so as to control conduct by the licensee not embraced in the patent monopoly. \* \* \*

The same has been held uniformly as to various trade practices or schemes to exact additional compensation under a patent or copyright since the decision in *Motion Picture Patents Co. v. Universal Film Co.*, *supra*, definitely establishing the principle, where the Court said (243 U. S. 517);

"\* \* \* under color of its patent the owner intends to and does derive its profit, not from the invention on which the law gives it a monopoly, but from the unpatented supplies with which it is used, and which are wholly without the scope of the patent monopoly, thus in effect extending the power to the owner of the patent to fix the price to the public of the unpatented supplies as effectively as he may fix the price on the patented machine."

In that case the patent owner based his charge partly on the sizes of theatres in which his patented films were used, as does the plaintiff Society (R. 74).

So, the Constitution and federal statute do not confer any right on a copyright holder to demand or receive compensation based in part upon the use of other music or entertainment material, whether or not they be copy-

righted. He has no right to collect compensation for use of a particular copyrighted musical composition based upon a percentage of gross receipts from programs in which his composition is not used.

Therefore, Section 4-C of the 1939 Act does not conflict with the Fourteenth Amendment or other part of the Constitution by taking property or a right of the plaintiffs conferred by the copyright act, because the plaintiffs have no property right in any program not using their music.

Thus analyzed, Section 4-C is merely an exercise of police power within the state's legitimate sphere and is justified for the reason expressed by this Court in the Motion Picture Patents case, *supra*, at page 519:

"A restriction which would give to the plaintiff such a potential power for evil over an industry which must be recognized as an important element in the amusement life of the nation, under the conclusions we have stated in this opinion, is plainly void, because wholly without the scope and purpose of our patent laws and because, if sustained, it would be gravely injurious to that public interest, which we have seen is more a favorite of the law than is the promotion of private fortunes."

The appropriateness of the Florida regulation is illustrated by the consent decree entered by the U. S. District Court, Eastern District of Wisconsin, February 3, 1941, in *United States v. Broadcast Music Inc.*, copy of which is attached as Appendix "D." That is a suit brought by the Government under the Sherman Act to enjoin

certain restraints of trade practiced by defendant. Paragraph II (3) of the decree provides that the defendant's license may only be based upon a percentage of revenue, *at the licensee's option, and even then, the amount payable must bear a reasonable relation to the per program basis.* As Broadway Music Inc. is a competitor of the plaintiff Society, the decree does not become effective until 90 days after a similar decree has been entered against the Society.

### Conclusion

In this brief defendants have shown:

That plaintiffs are a price-fixing combination "unitedly exercising" the individual monopolies granted them by law "to restrain competition" (*Standard Oil Co. (Ind.) v. United States*, *supra*); that the injunction which they obtained was sought for the avowed purpose of perpetuating these same monopolistic practices, and for that reason, should have been denied;

That the main anti-monopoly provisions of the 1937 statute are within the police power of the State, and, being severable from the sections which the District Court adjudged unconstitutional, should have been sustained;

That sections 4-A and 4-C of the 1939 Act are also clearly within the police power.

The decree of the lower court should be corrected accordingly, since on this appeal the whole case is before the Court, and it should render such decree as under all the circumstances may be proper. See *United States v. Rio*

*Rio Grande Irrigation Co.* 184 U. S. 416, 423; *Ridings v. Johnson*, 128 U. S. 212-218; *Patterson v. Alabama*, 294 U. S. 600-607.

Respectfully submitted,  
J. TOM WATSON,  
Attorney General of Florida.  
TYRUS A. NORWOOD,  
Assistant Attorney General.  
LUCIEN H. BOOGS,  
ANDREW W. BENNETT,  
*Counsel for Defendants.*

**APPENDIX "A"**

(1937 ACT)

CH. 17807 LAWS OF FLORIDA

AN ACT Declaring to be an Unlawful Monopoly and Its Purpose to be in Restraint of Trade, any Combination of Persons, Firms, or Corporations Which Determine the Amount of Money to be Paid to it or to Its Members for the Privilege of Rendering Privately or Publicly for Profit Copyrighted Vocal or Instrumental Musical Composition, When Such Combination is Composed of a Substantial Number of All Musical Composers, Copyright Owners, or Their Heirs, Successors or Assigns; to Require Each Composer and Each Author of Vocal or Instrumental Copyrighted Musical Compositions to Act Independently of any Combination as Herein Declared Unlawful in Determining License Fees and Other Rights; to Require the Author, Composer and Publisher to Specify Upon the Musical Composition the Selling Price Thereof, Including Public Performance for Profit; to Declare That any Purchaser Thereof, Who Pays Such Price Therefor Shall Have the Right to Render Such Music Privately or Publicly for Profit; to Declare All Existing Agreements Requiring License Fees or Other Exactions for the Privilege of Rendering Copyrighted Musical Compositions Publicly for Profit, Made With any Combination, Firm or Corporation Herein Declared Unlawful, to be Void and Nonenforceable; to Permit the Present Owners, Possessors and Users of Such Copyrighted Music to Render the Same Privately or Publicly for Profit Without Interference by Such Unlawful Combination; to Provide for the Protection of Theatres, Moving Picture Houses, Hotels, Places for Education and Public Performance or Amusement,

Radio Broadcasting and Radio Receiving and Radio Re-Broadcasting Station Affiliated with Other Persons, Firms or Corporations Outside of the State of Florida, Against the Collection of License Fees or Other Exactions by Such Out of the State Affiliates for or on Account of any Combination Herein Declared Unlawful; to Provide all Liability for any Infringement of Copyrighted Musical Compositions Conveyed by Radio Broadcasting, Air, Wire, Electrical Transcription or Sound producing Apparatus, or by Personal Performance Coming Outside of the State of Florida and Used Herein to Rest Exclusively on the Out of the State Person, Firm or Corporation Originally Sending the Same Into This State for Use Herein; to Provide Penalties for the Violation Hereof; to Empower the State's Attorney, Under the Direction of the Attorney General, Upon the Complaint of any Party Aggrieved by any Violation Hereof to Proceed to Enforce the Penalties Hereof Against Such Combination and Any of Its Members, Agents or Representatives; to Empower any Party Aggrieved by any Violation Hereof to Proceed in His Own Right Hereunder; to Define the Legal Procedure Required to Carry Out the Provisions Herein; to Provide for the Recovery of Costs, Expenses and Attorney's Fees; to Provide That the Terms of This Act Shall be Cumulative; to Provide that any Part of This Act Declared Illegal Shall not Affect the Validity of the Remaining Parts Hereof.

BE IT ENACTED BY THE LEGISLATURE OF THE

STATE OF FLORIDA:

SECTION 1. It shall be unlawful for authors, composers, publishers, owners, or their heirs, successors or assigns, of copyrighted vocal or instrumental musical compositions to form any society, association, partnership,

corporation or other group or entity, called herein a combination, when the members therein constitute a substantial number of the persons, firms or corporations within the United States who own or control copyrighted vocal or instrumental musical compositions, and when one of the objects of such combination is the determination and fixation of license fees or other exactions required by such combination for itself or its members or other interested parties for any use or rendition of copyrighted vocal or instrumental musical compositions for private or public performance for profit; and the collection or attempted collection of such license fee or other exaction so fixed and determined by any member, agent, or representative of such combination herein declared unlawful, from any person, firm or corporation within this State, including theatres, radio receiving, radio broadcasting and radio rebroadcasting stations, moving picture houses, hotels, restaurants, clubs, dance halls, recreation rooms, pavilions, colleges, universities, churches, or any one who uses music in the conduct of his business, or the officers, directors, proprietors, managers, owners or representatives thereof, who render or cause to be rendered or permit to be rendered such copyrighted vocal or instrumental musical compositions privately or publicly for profit through personal performance, or through radio or any instrumentality or sound producing apparatus, shall be and the same are hereby declared unlawful and illegal; and such license fees or other exactions by such combination or its agents, member, or interested parties shall not be collected in any Court within the boundaries of this State; and such collection or attempted collection of such license fee or other exaction by such combination or its agents, members or interested parties, shall be a separate offense hereunder;

and any such combination of authors, composers or publishers, or their heirs, successors or assigns, as herein defined, is hereby declared to be an unlawful monopoly in this State; and the fixing of prices or exactions for use or rendition of copyrighted musical compositions and the collecting or attempting to collect such license fees or other exactions by it or for its members or other interested parties, is hereby declared illegal and in restraint of trade; and such collection or attempted collection is declared to be an intrastate transaction within this State, and shall be subject to the terms and penalties of this Act.

SECTION 2-A. All authors, composers or publishers, and their heirs, successors or assigns, shall specify or cause to be specified legibly upon the musical composition, in whatever form the same may be published, printed, manufactured or otherwise prepared for use or rendition, the selling price thereof so arrived at and determined for all uses and purposes; and when any purchaser or user acquires the same within this State and pays the selling price so specified thereon to the seller or publisher of such musical composition, then said purchaser or user may use or render, or cause or permit to be used or rendered, the said copyrighted musical composition by persons individually or with other performers, actors and singers, or by an individual instrument player, or by orchestras and bands, or over or through or by means of radio loud speakers, radio receiving, radio broadcasting and radio re-broadcasting stations, electrical transcriptions, musical records, sound apparatus or otherwise, and the same may be so rendered either privately or publicly for profit without further license fees or other exactions; and such copyright owner or proprietor in such event shall be deemed to have received full compensation for the rendition and

all uses of such musical compositions for private and public performance for profit.

**SECTION 2-B.** In the event any author, composer or publisher, or any of his heirs, successors or assigns, fails or refuses to affix on the musical composition the selling price, and collect the same, for private or public performances for profit, at the time and in the manner specified in this Act, then any person, firm or corporation in this State who may have purchased and paid for such copyrighted musical composition, may use the same for private or public performance for profit without further license fee or other exaction; and such person, firm or corporation so using or rendering the same shall be free from any and all liability in any infringement or injunction suit, or in any action to collect damages instituted by such copyright proprietor or owner in any Court within this State.

**SECTION 2-C.** Nothing in this Section or this Act shall be construed to give to any purchaser of copyrighted musical compositions, as herein provided, the right to resell, copy, print, publish or vend the same; nor to prevent authors and composers from determining and fixing the price to be charged for the use or rendition of their copyrighted musical compositions, provided such authors and composers act independently of any such combination as in Section 1 hereof declared unlawful.

**SECTION 3.** All existing contracts, agreements or licenses now existing within this State, made by any person, firm or corporation with any combination declared unlawful under Section 1 hereof, are hereby declared void and non-enforceable in any Court within this State, and are hereby declared to have been entered into as intra-state transactions with such unlawful combinations

and in restraint of trade. And all such contracts, agreements, licenses and the attempted enforcement thereof may be enjoined by any person, firm or corporation sought to be bound thereby; and any agent, member or representative of such unlawful combination enforcing or attempting to enforce the terms of such existing contract, agreement or license, shall be guilty of a violation of the terms of this Act; and for any collection or attempted collection of moneys set out in the illegal contract, agreement or license, shall be subject to the penalties of this Act.

**SECTION 4-A.** Any person, firm or corporation who owns, leases, operates or manages a radio broadcasting, radio receiving or radio re-broadcasting station within this State, shall be and is hereby authorized to receive, broadcast and re-broadcast copyrighted vocal or instrumental musical compositions, the copyrights of which are owned or controlled by any such combination declared unlawful by Section 1 hereof, without the payment, to such combination or to its agents, representatives or assigns, of any license fee or other exaction declared illegal and non-collectible by the terms hereof.

**SECTION 4-B.** When such radio receiving, radio broadcasting or radio re-broadcasting station is affiliated with any other person, firm or corporation owning, leasing or operating a radio broadcasting station outside this state from whence copyrighted vocal or instrumental musical compositions originate or emanate, and which are received, used, broadcast or re-broadcast within this State, in accordance with the terms of any affiliation agreement or other contract, then such person, firm or corporation owning, leasing, operating or managing a radio broadcasting station outside this State, shall be and

is hereby prohibited from in any manner charging or attempting to charge, or collecting or attempting to collect, from any person, firm or corporation who owns, leases, operates or manages a radio broadcasting, radio receiving or radio re-broadcasting station within this State, any herein declared non-collectible license fee or other exaction, for the purpose of paying or repaying the same outside this State to any combination, or its members, stockholders or other interested parties, declared unlawful by Section 1 hereof; and any such person, firm or corporation, collecting or attempting to collect such license fee or other exaction against such persons, firms or corporations within this State for the purpose of paying or reimbursing itself for having paid any such license fee or other exaction herein declared unlawful and non-collectible, shall be deemed guilty of a violation of the provisions of this Act; and such person, firm or corporation from without this State is hereby declared to be an agent and representative of such combination as declared illegal and unlawful by Section 1 hereof, and shall be subject to all the penalties hereof.

SECTION 5-A. Any person, firm or corporation who own, operates or manages any theatre or theatres, moving picture house or houses, or a similar place or places for amusement and public performance within this State, shall be and is hereby authorized to receive, use and render, or cause to be received, used and rendered, by the personal performance of artists, singers, musicians, orchestras, bands, or actors, or by loud speakers, radio, sound production or re-production apparatus or instrumentalities, or electrical transcriptions, or by any other means of rendition whatsoever, copyrighted vocal or in-

strumental musical compositions, the copyrights of which are owned or controlled by any such combination declared unlawful by Section 1 hereof, without the payment, to such combination, or to its agents, representatives or assigns, of any license fee or other exaction declared illegal and non-collectible by the terms of this Act.

SECTION 5-B. When such theatre or theatres, moving picture house or houses, or other places for amusement or performance is or are affiliated or under contract in any manner whatsoever with any other person, firm or corporation furnishing in any form or manner copyrighted musical compositions from outside this State, or supplying such persons, firms or corporations in this State with radio broadcasts or electrical transcriptions, sound production instrumentalities or apparatus, or artists, performers, musicians, singers, players, orchestras, bands or other artists or talent, wherein or whereby copyrighted vocal or instrumental musical compositions are privately or publicly rendered for profit, then such person, firm or corporation outside this State shall be and is hereby prohibited from in any manner charging or attempting to charge, or collecting or attempting to collect, from any such person, firm or corporation who owns, leases operates or manages such theatre or theatres, moving picture house or houses, or other places for amusement or public performance within this State, any license fee or other exaction for the purpose of paying or repaying the same to any such combination declared unlawful by Section 1 hereof for the use, rendition or performance of such copyrighted musical composition; and any such person, firm or corporation, collecting or attempting to collect, such license fee or other exaction from outside this State

against such persons, firms or corporations within this State for the purpose of paying or reimbursing itself for having paid any such license fee or other exaction herein declared unlawful and non-collectible, shall be deemed guilty of a violation of the provisions of this Act; and such person, firm or corporation from without this State is hereby declared to be an agent and representative of such combination declared illegal and unlawful by Section 1 hereof, and shall be subject to all the penalties hereof.

SECTION 6. Whenever any person, firm or corporation who owns, leases, operates or manages a radio receiving, radio broadcasting or radio re-broadcasting station, or theatre or moving picture house or similar place for amusement and public performance or for the rendition in any manner of copyrighted vocal or instrumental musical compositions, and which radio stations and theatres, and other persons, firms or corporations aforementioned, are affiliated with persons, firms or corporations outside this State from whence said copyrighted vocal or instrumental musical compositions originally emanate either by radio, sound production instrumentalities or apparatus, or by furnishing a person or persons to play or sing such music within this State, then the responsibility and liability for the use of all copyrighted vocal or instrumental musical compositions thus emanating from outside this State shall rest with and be upon such affiliated person, firm or corporation from outside this State who originates the broadcasting or the performance or the sound production instrumentality or apparatus, or sends the personal singers or performers into this State; and the owner of proprietor of the copyrighted vocal or instrumental musical compositions shall be and is hereby prohibited from

suing for infringement, loss or damage within the boundaries of this State, for the use or rendition of such copyrighted vocal or instrumental musical compositions because such persons, firms or corporations used, rendered or performed the same within the State; and said copyright owner or proprietor shall make his collection therefor from the person, firm or corporation from outside this State from whence the use of said copyrighted vocal or instrumental musical compositions originally emanated; the use or rendition by radio broadcast, radio re-broadcast or sound producing instrumentalities or apparatus, or electrical transcription, or by the personal performance of singers, players and musicians sent into this State, or otherwise, of such copyrighted musical compositions within this State in the manner set forth in this section, shall be considered, for the purpose of this Act, as intra-state business of this State and subject to the control, regulation and prohibitions set forth in this Act notwithstanding that such copyrighted musical compositions originated or emanated from without this State.

**SECTION 7-A.** Any person, firm or corporation within this State who shall act as the representative of any combination herein declared unlawful as defined in Section 1 hereof, shall, for the purpose of this Act, be deemed as official representative and agent of such unlawful combination and shall be construed to be doing business within this State, and service of any process against such combination may be had upon such representative or the agent of such representative as herein defined; and when so served, such process shall have the same legal effect as if served upon a duly elected officer or managing agent or other official representative upon whom service might

otherwise be made upon such combination within this State.

**SECTION 7-B.** Furthermore, any person or persons who negotiates for, or collects, or attempts to collect license fees of other exactions, or who acts as the representative or agent for any combination declared unlawful in Section 1 hereof, shall, for the purpose of this Act, be considered as a part of said unlawful combination; and such person, firm or corporation shall be subject to all the penalties in this Act provided for violations thereof.

**SECTION 8.** Any combination as in Section 1 hereof declared to be unlawful, and any other person, firm or corporation acting or attempting to act within this State in violation of the terms of this Act, or any representative or agent of any person, firm or corporation who aids or attempts to aid any such unlawful combination as defined in Section 1 hereof, in the violation of any of the terms of this Act, in any manner whatsoever, shall be punished by a fine of not less than \$50.00 or more than \$5,000.00, and by imprisonment in the penitentiary not less than one or more than ten years, or by either such fine or imprisonment.

**SECTION 9.** The Several Circuit Courts of this State shall have jurisdiction to prevent and restrain violations of this Act, and, on the complaint of any party aggrieved because of the violation of any of the terms of this Act anywhere within this State, it shall be the duty of the State's Attorneys in their respective circuits, under the direction of the Attorney-General, to institute proceedings, civil or criminal or both, under the terms hereof, against any combination as defined in Section 1 hereof,

and against any of its members, agents or representatives as herein defined, to enforce any of the rights herein conferred, and to impose any of the penalties herein provided, or to dissolve any such combinations as declared unlawful by Section 1 hereof. In civil actions such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of have been duly notified of such petition, the Court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree, the Court may at any time make such temporary restraining order as shall be deemed equitable.

**SECTION 10-A.** Any person, firm or corporation in this State aggrieved by reason of anything forbidden in this Act may sue therefor in any Circuit Court in the circuit in which the violation or a part thereof took place, to recover any damages assessed as a result of the violation of the terms of this Act, and shall be entitled to recover his or its costs, including reasonable attorney's fees to be fixed by the Court in such action.

**SECTION 10-B.** In the event of the failure of the State's Attorney and Attorney-General to act promptly, as herein provided, when requested so to do by any aggrieved party, then such party may institute a civil proceeding in his own behalf, or upon behalf of Plaintiff and others similarly situated, as the State's Attorney and the Attorney-General could have instituted under the terms of this Act.

**SECTION 11-A.** In any proceeding brought under the terms of this Act, any attorney of record for the Plaintiff

may file with the Clerk of the Court in which such action is pending, a petition praying that the Defendant or Defendants be required to file with the Clerk of said Court exact copies of all documentary evidence, records or data in the possession or under the control of said Defendant or Defendants pertaining to the issues as alleged by the Plaintiff in the cause; and the Circuit Court, upon the presentation to it of such petition, shall determine what part, or all, or any of such evidence shall be produced, and enter an order to that effect. A copy of such order shall be mailed to each Defendant at his, her or its last known address, which shall be deemed sufficient notice and service upon such Defendant or Defendants. Or, the same may be served by mail in the same manner upon the attorney or attorneys of record for the Defendant or Defendants, and this shall be deemed sufficient notice and service upon said Defendant or Defendants.

SECTION 11-B. If said Defendant or Defendants shall fail to file with the Clerk of the Court in which such action is pending said copy or copies of documentary evidence, records, or data, and within the time provided in said order, the Court shall adjudge such Defendant or Defendants guilty of contempt and shall assess a fine of \$100.00 against such of the Defendants for each and every day that such Defendant or Defendants fail to comply with said order, and judgment shall be entered accordingly. And the Plaintiff may collect the same against the Defendant or Defendants with interest thereon and costs, including a reasonable attorney's fee. And the Court shall determine when the judgment is rendered what disposition shall be made of the proceeds collected after the payments of costs and attorney's fees.

**SECTION 12.** If any section, sub-section, sentence, clause or any part of this Act, is for any reason, held or declared to be unconstitutional, inoperative or void, such holding or invalidity shall not affect the remaining portions of this Act; and it shall be construed to have been the legislative intent to pass this Act without such unconstitutional, inoperative or invalid part therein; and, the remainder of this Act, after the exclusion of such part or parts, shall be held and deemed to be valid as if such excluded parts had not been include therein.

**SECTION 13.** Nothing in this Act shall be construed as repealing any other law or parts of laws in reference to any of the matters contained in this Act; and the rights and remedies and provisions herein provided shall be and are hereby declared to be cumulative to all other rights, remedies and provisions now provided under the laws of the State of Florida.

**SECTION 14.** This Act shall become effective immediately upon its becoming a law.

Approved by the Governor June 9, 1937.

Filed in Office Secretary of State June 10, 1937.

**APPENDIX "B"****1939 ACT****CH. 19653 LAWS OF FLORIDA**

**AN ACT Relating to Public Performing Rights in Copyrighted Musical Compositions and Dramatico-Musical Compositions; Defining the Same; Regulating Licensing of Same; Prescribing Filing Fees; Making Provisions for a Resident Agent in the State; Levying a Tax on the Gross Receipts From the Licensing of Such Rights Within the State of Florida; Providing for the Enforcement of This Act; the Promulgation of Rules and Regulations, Governing the Enforcement of This Act; Appropriating the Proceeds of the Tax and Fees Levied Herein and Repealing Certain Laws in Conflict Herewith.**

**BE IT ENACTED BY THE LEGISLATURE OF THE**

**STATE OF FLORIDA:**

**SECTION 1.** As used in this Act, "person" means any individual, resident or non-resident, of this state, and every domestic or foreign or alien partnership, society, association or corporation; the words, "performing rights" refer to "public performance for profit"; the word "user" means any person who directly or indirectly performs or causes to be performed musical compositions for profit; the term "blanket license" includes any device whereby public performance for profit is authorized of the combined copyrights of two or more owners; the term "blanket royalty or fee" includes any device whereby prices for performing rights are not based on the separate performance of individual copyrights.

**SECTION 2.** It shall be unlawful for any person to

sell, license the use of, or in any manner whatsoever dispose of, in this state, the performing rights in or to any musical composition or dramatico-musical composition which has been copyrighted, and is the subject of a valid existing copyright, under the laws of the United States, or to collect any compensation on account of any such sale, license or other disposition, unless such person:

(a) Shall first have filed with the Comptroller on forms prescribed by the Comptroller a list describing each such musical composition and dramatico-musical composition, the performing rights in which said person intends to sell, license or otherwise dispose of in this state, which description shall include the following: The name and title of the copyrighted composition, the date of the copyright, the number or other identifying symbol given thereto in the United States copyright office, the name of the author, the name of the publisher, the name of the present owner of the copyright to said composition, and the name of the present owner of the performing rights thereto. Additional lists of such copyrighted compositions may be filed by any such person from time to time, and shall be subject to all the provisions of this Act. A filing fee of two cents a composition shall be required by the Comptroller for filing any list under this Act.

(b) Shall simultaneously file an affidavit which shall describe the performance rights to be sold, licensed or otherwise disposed of and shall state that the compositions so listed are copyrighted under the laws of the United States, that the facts contained in the list to which said affidavit relates are true, that affiant has full authority to sell, license or otherwise dispose of the performing rights in such compositions; and the affidavit shall set

forth the name, age, occupation and residence of the affiant; and if an agent, the name, occupation and residence of his principal.

**SECTION 3.** The list provided for in the preceding section shall be made available by the Comptroller to all persons for examination, and taking of copies, in order that any user of such compositions in this state may be fully advised concerning the performing rights therein, and avoid being overreached by false claims of ownership of said performing rights, and also avoid committing innocent infringements of said works. The Comptroller may, if in his discretion he deems it necessary, in order to prevent such overreaching and to protect the citizens of this state from committing innocent violations of the copyright laws of the United States, causes a list of all such copyrighted material filed with him to be published once a year or oftener in a form and medium which he shall deem suitable for said purpose. A duplicate of any list so filed by any such person shall at his request be certified by the Comptroller and shall by the Comptroller be given or delivered to such person, who shall exhibit the same on demand of anyone to whom such person seeks to sell, license or otherwise dispose of said performing right.

**SECTION 4-A.** It shall be unlawful for two or more owners of the copyrights of musical compositions or dramatico-musical compositions to associate or combine together in any manner, directly or indirectly, for the purpose of issuing blanket licenses for the public performance for profit of their compositions upon a blanket royalty or fee covering more than one, or all, of such compositions owned or controlled by the members of such asso-

tiation unless each individual copyright owner included in such association, or such association in behalf of each individual copyright owner, also shall make available to each user of such compositions within the state, at the option of the user, the right to perform publicly for profit each such copyrighted musical composition owned by him or it at a price established for each separate performance of each such composition. To this end, there shall be filed with the Comptroller, either as a part of the list required by Section 2 hereof or as a separate document by such copyright owner, or by such association in behalf of such owner, a schedule of prices for the performing rights to each separate performance for profit of each such composition contained in such list, together with an affidavit of the copyright owner of such compositions that the price so stated has been determined by such copyright owner acting for himself and not either directly or indirectly in concert or by agreement with the owner or owners of any other copyrights. Such schedule of prices may contain reasonable classifications determined by use and function, or either, of the users of said compositions, with separate price for each classification, provided that there is equal treatment of all persons within each classification and that there is no unreasonable discrimination between classifications. Any copyright owner may at his election fix one price which shall be applicable to each rendition of each of such compositions owned by him except to the extent that he elects to name specific compositions and to fix other prices for each rendition thereof; and said prices shall remain in force and effect until a new schedule of prices with respect to the performing rights to such compositions has been similarly filed in the office of the Comptroller, at any time, at the election of such owner changes

in prices to become effective seven days from the date of filing thereof. The schedule of prices provided for herein shall be made available by the Comptroller to all persons for examination and the taking of copies, and may be published by him in the same manner as provided in Section 3 hereof.

**SECTION 4-B.** Any person issuing a blanket license for performance rights shall file with the Comptroller within thirty days from the date such blanket license is issued a true and complete copy of each such license issued or sold with respect to performance within this state, together with the affidavit of such person that such copy is a true and complete copy of the original and that it sets forth each and every agreement between the parties thereto with respect to such performing rights. The Comptroller shall charge for filing such contracts the same fee allowed clerks of the circuit court for similar services.

**SECTION 4-C.** It shall be unlawful for any person selling, licensing the use of or in any manner whatsoever disposing of or contracting to dispose of, in this state, the performing rights in or to any musical composition or dramatico-musical composition, to make any charge or to contract for or collect any compensation as a condition of using said performing rights based in whole or in part on any program not containing any such composition, and any such charge or contract for compensation shall be valid and enforceable only to the extent that it is based and computed upon a program in which such composition is rendered.

**SECTION 4-D.** It shall be unlawful for any person selling, licensing the use of or in any manner whatsoever disposing of or contracting to dispose of in this state public

performing rights in or to any musical composition or dramatico-musical composition to make any charge or to contract for or collect any composition for the use or performance of any such composition that has not been listed with the Comptroller as provided in Section 2.

**SECTION 5.** At the time of filing the information required in Section 2 and 3, the owner of said performing rights shall execute and deliver to the Secretary of State on a form to be furnished by the Secretary of State, an authorization empowering the Secretary of State to accept service to process on such person in any action or proceeding, whether cognizable at law or in equity, arising under this Act, and designating the address of such person until the same shall be changed by a new form similarly filed; and service of process may thereafter be effected in this state on such person in any such action or proceeding by serving the Secretary of State with duplicate copies of such process; and immediately upon receipt thereof the Secretary of State shall mail one of the duplicate copies by registered mail to the address of such person as stated on authorization last filed by him. A filing fee of \$5.00 shall accompany this notice and the Secretary of State shall deposit same in the General Revenue Fund of the State of Florida.

**SECTION 6.** No person shall be entitled to commence or maintain any action or proceeding in any court with respect to such performing rights, or to collect any compensation on account of any sale, license or other disposition of such performing rights, in this state, except upon pleading and proving compliance with the provisions of this Act.

Copies, certified by the Comptroller as such, of each or

all of the lists, license agreements, affidavits and other documents filed with the Comptroller pursuant to the requirements of this Act, shall be furnished by the Comptroller to any person upon request at the prices regularly charged by a clerk of the circuit court for such work. Such certified copies shall be admitted in evidence in any action or proceeding in any court to the same extent as the original thereof.

**SECTION 7.** From and after the effective date of this Act there is hereby levied, and there shall be collected, a tax, for the act or privilege of selling, licensing, or otherwise disposing of performing rights in such compositions in this state, in an amount equal to three per cent of the gross receipts of all such sales, licenses or other dispositions of performing rights in this State, payable to the State Comptroller on or before the fifteenth day of March, 1940 with respect to all such gross receipts for the portion of the calendar year 1939 after the effective date of this Act, and annually thereafter, on or before the fifteenth of March of each succeeding year, with respect to the gross receipts of the preceding calendar year. A return on a form prescribed by the Comptroller shall be made by all persons subject to this tax on or before the 15th day of March every year which shall accompany a remittance of the tax due.

The Comptroller shall have authority through his authorized agents to examine and audit the books and records of any person he may deem subject to the tax or fees under this act and may require such persons to appear before him at his office in the Capitol in the City of Tallahassee, Florida, with such records and papers as may be necessary after giving thirty days notice to such person

through said person's authorized agent, the Secretary of State.

The Comptroller shall also have authority through his authorized agents to examine and audit the books, records and accounts of any licensee or user making payments for use of public performing rights in the State of Florida to any person in order that the Comptroller may determine or check on gross receipts of those selling or licensing public performing rights in the State of Florida. Any person refusing the Comptroller or his duly authorized agents access to such books, records and accounts shall be subject to penalties prescribed in Section 9 hereof and may be required to appear in person with all books, papers and accounts required by the Comptroller at the Comptroller's office in the Capitol, Tallahassee, Florida, within ten days after receipt of notice which the Comptroller shall send by "registered mail, return receipt requested."

Should the Comptroller determine that any person liable for any tax or fees under this act has made an incorrect return or has made no return at all, or has failed to pay any tax or fees due, the Comptroller shall after determining the amount of such tax or fees due the State of Florida, from the best information at his command, certify such claim for delinquent taxes to said person through his duly designated agent, the Secretary of State, and unless payment of such delinquent tax is received within thirty days of delivery of said notice to the Secretary of State the Comptroller shall apply to a Circuit Judge in Leon County for the appointment of a receiver to take over and administer all assets of said delinquent taxpayer in the State of Florida.

The Circuit Judge upon the Comptroller's application

properly authenticated, shall appoint some agent of the Comptroller as receiver, to serve without further compensation, but who shall be allowed all actual expenses. After posting such bond as the Judge may determine proper, the said receiver shall take over and administer the affairs of said delinquent taxpayer within the State of Florida, collect accounts and do all things necessary to protect the interests of both the State of Florida and the said delinquent taxpayer and from such collections as he may make, he shall first pay the expenses of the receivership and any litigation incident thereto and the tax plus interest at the rate of 2 per cent per month or fraction thereof from the last day of the year for which the tax was due.

After having satisfied the claims of the State and paid all costs of the receivership the receiver shall make a return to the court which shall orders all assets returned to the taxpayer.

**SECTION 8.** It shall be unlawful for any person, without the consent of the owner thereof, if said owner shall have complied with the provisions of this Act, publicly to perform for profit, in this state, any such composition, or for any person knowingly to participate in the public performance for profit of such composition, or any part thereof.

**SECTION 9.** Any violation of this Act shall constitute a misdemeanor, to be punished as provided elsewhere in the laws of this state.

**SECTION 10.** Any person or persons who negotiates or collects or attempts to collect license fees or other exactions or acts in any capacity whatsoever as a representa-

tive or agent for any person owning public performing rights of any copyrighted composition shall be subject to all the penalties in this Act provided for violations thereof.

**SECTION 11.** Any person in this State aggrieved by reason of any violation of this act may sue thereof in the circuit court in which he resides or in the circuit in which the violation took place to recover any damages as the result of the violation of the terms of this act or to require specific performance under the provisions of this act and shall be entitled to recover his costs including reasonable attorneys fees to be fixed by the court.

**SECTION 12.** The several Circuit Courts of this State shall have jurisdiction to prevent and restrain violations of this Act, and, on the complaint of any party aggrieved because of the violation of any of the terms of this Act anywhere within this State, it shall be the duty of the State's attorney in their respective circuits, under the direction of the Attorney-General, to institute proceedings, civil or criminal or both under the terms hereof, to enforce any of the rights herein conferred, and to impose any of the penalties herein provided. In civil actions such proceeding may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of having been duly notified of such petition, the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree, the Court may at any time make such temporary restraining order as shall be deemed equitable.

**SECTION 13.** In the event of the failure of the State's Attorney and Attorney-General to act promptly, as here-

in provided, when requested so to do by any aggrieved party, then such party may institute a civil proceeding in his own behalf, or upon behalf of Plaintiff and other similarly situated, as the State's Attorney and the Attorney-General could have instituted under the terms of this Act.

SECTION 14. After the costs and expenses of enforcing this act and the collection of the taxes and fees herein levied and imposed are deducted the amount of which costs and expenses are hereby appropriated to be paid from the proceeds of this act, there is hereby appropriated the entire balance paid into the Comptroller under and by virtue of this act to the General Revenue Fund of the State of Florida.

SECTION 15. All laws or portions thereof whether general, special or local, which relate to the same subject matter as this Act, and which are inconsistent with the provisions of this Act, are hereby superseded by the provisions of this Act to the extent that such inconsistency exists. Nothing contained in this Act shall be so construed as to impair or affect the obligation of any contract or license which was lawfully entered into prior to the effective date of this Act.

Provided, however, nothing in this Act shall be construed to repeal, supersede or modify any of the statutes of the State of Florida pertaining to monopoly or restraint of trade, including but not limiting the generalities of the foregoing Sections 1, 2-C, 3, 4, 5, 7, 8, 9, 10, 11, 12, 13 and 14, of Chapter 17807, Laws of Florida 1937. Provided further, the revenue provisions of this Act shall take effect immediately it becomes a law and persons have con-

tracts to sell public performing rights to users in the State of Florida shall file copies of such contracts with the Comptroller within thirty days of the date this Act becomes a law and shall within ninety days of the time this Act becomes a law comply with other provisions of this Act that require filing of any data.

**SECTION 16.** If any section in this Act or any part of any section shall be declared invalid or unconstitutional, such declaration of invalidity shall not affect the validity of the remaining portions hereof.

**SECTION 17.** This Act shall take effect immediately upon its becoming a law.

Became a law without the Governor's approval.

Filed in Office Secretary of State, June 12, 1939.

**APPENDIX "C-1"**  
**United States District Court**  
**For The Western District of Washington**  
**Southern Division**

GENE BUCK, individually and as President of the American Society of Composers, Authors and Publishers, et al., *Complainants,*

**IN EQUITY  
CAUSE NO.**

606

—vs.—

PHIL H. GALLAGHER, as State Treasurer of Washington, et al., *Defendants.*

Before: HANEY, Circuit Judge, and BOWEN and BLACK, District Judges.

HANEY, Circuit Judge.

This is a suit to enjoin enforcement of a Washington statute on the ground of its unconstitutionality. The cause has been submitted on an application for a permanent injunction.

Briefly stated, the statute attacked declares it to be unlawful for separate copyright owners to pool the copyrights in order to fix prices, collect fees, or issue blanket licenses for the use of such copyrights, except where the licenses are issued assessing rates on a "per piece" system of usage. The detailed provisions of the statute need not be discussed.

The bill prayed for a permanent injunction restraining defendants from taking any act of proceeding under the statute, and for a decree declaring such statute unconstitutional. It is alleged in the bill that on February 13,

1914, a small group of composers, authors and publishers organized a voluntary unincorporated non-profit association under the laws of New York, which they designated as the American Society of Composers, Authors and Publishers, hereafter called the Society, for the purpose of licensing to users of music throughout the country the right to publicly perform for profit the works of its members. It was further alleged that there are approximately 123 publisher members of the Society and about 1000 writer and composer members of the Society; that such members assign their respective exclusive right of public performance for profit in their respective musical compositions; that similar organizations exist in foreign countries, and the Society has the exclusive right to and does license within the United States, the public performance for profit of the musical compositions copyrighted by all members of such foreign societies; and that the Society's blanket license permits the licensee to use many hundreds of thousands of compositions composed and written by more than 44,000 members of such foreign societies.

It appears that the members assign to the Society the exclusive right of public performance, and the Society then has the exclusive right to permit by licenses, licensees to use or not to use the compositions of the Society's members, to fix the price for licenses, to sue for infringement, and in general, to manage the right of public performance in the same manner as the owner of the copyright.

The motion to dismiss on behalf of the defendants, was based on several grounds, one of which was: "That mere unconstitutionality, even assuming it to exist, does not warrant injunctive relief, but that the facts alleged must

bring the case within the recognized rules of equity relating to injunctions, and that complainants have not done so." The motion to dismiss filed by intervener, K. M. O., Inc., states a number of grounds, one being that the plaintiffs are not entitled to equity because they were monopoly. Although no answers have been filed, we may treat the motions to dismiss as answers. Intervener Lockhart argues the monopoly question, but his motion to dismiss does not present such question. We treat his motion as an answer and amended so as to present the question.

Regarding the completeness of the monopoly of the Society, it is said in *Buck v. Swanson* (D. C. Neb. 33 F. Supp. 377, 386):

" \* \* \* Of the popular music necessary for the successful operation of radio stations, dance halls, hotels and theatres, the society has control of about 85 per cent or 90 per cent and also has control of from 50 per cent to 75 per cent of the standard or older music that is played occasionally. All of the large and more influential publishers of music in the United States are members of the society. The users of music in Nebraska can not successfully carry on their business except they deal with the plaintiff society because there is no place where no person or agency to whom users of music in Nebraska may go in order to deal for public performance rights and negotiate for music in any substantial amount sufficient to meet the ordinary needs of music users in the state, except the society."

Mr. Justice Black in *Gibbs v. Buck*, 307 U. S. 66, 81, says:

\*\*\* This combination apparently includes practically all (probably 95 per cent) American and foreign copyright owners controlling rendition of copyrighted music for profit in the United States. Not only does this combination fix prices through a self-perpetuating board of twenty-four directors, but its power over the business of musical rendition is so great that it can refuse to sell rights to single compositions, and can, and does, require purchasers to take, at a monopolistically fixed annual fee, the entire repertory of all numbers controlled by the combination."

In the instant case, the testimony of the operators of two of the largest radio broadcasting stations in Washington was that it would be impossible to operate such stations without the music controlled by the Society. The Society has neither submitted evidence, nor made argument to the country.

On the hearing for an injunction pendente lite, we dismissed the cause for lack of jurisdiction. *Buck v. Case*, 24 F. Supp. 541. On appeal our decree was reversed with directions to take evidence on the jurisdictional question. *Buck v. Gallagher*, 307 U. S. 95. Subsequently, we referred the cause to a special master for the taking of evidence on the question, and directed him to make findings. The special master found facts disclosing jurisdiction in the court below. Believing that the evidence supports such findings, we sustain them as not being clearly erroneous.

Plaintiffs contend that the Washington statute is unconstitutional for a number of reasons, and rely on *Buck v.*

*Swanson* (D. C. Neb.), 33 F. Supp. 377, *Buck v. Harton* (D. C. Tenn.), 33 F. Supp. 1014, and *Buck v. Gibbs* (D. C. Fla.), 34 F. Supp. 510, holding somewhat similar statutes unconstitutional. Before passing on that question, it is necessary to determine whether or not plaintiffs may invoke the aid of a court of equity. If a party "has been engaged in an illegal business and has been cheated, equity will not help him." *Wheeler v. Sage*, 68 U. S. (1 Wall.) 518, 529. In other words, before plaintiffs may invoke the aid of a court of equity, they must come into court with clean hands. *Keystone Co. v. Excavator Co.*, 290 U. S. 240, 244. If the Society exists in violation of the Sherman Anti-Trust Act, it, and the members composing it, are not entitled to a decree for its benefit.

Section 1 (15 USCA Sec. 1) of the Sherman Anti-Trust Act provides in part:

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal. Every person who shall make any such contract or engage in any such combinations or conspiracy, shall be deemed guilty of a misdemeanor. \* \* \* "

Section 2 (15 USCA Sec. 2) of such act provides in part:

"Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor. \* \* \* "

Whatever the distinction between these two sections may be, \* the Supreme Court has recently said that Congress, by the act in question, "extended the condemnation of the statute to restraints effected by any combination in the form of trusts or otherwise, or conspiracy, as well as by contract or agreement, having those effects on the competitive system and on purchasers and consumers of good or services which were characteristic of restraints deemed illegal at common law." *Apex Hosiery Co. v. Leader*, 310 U. S. 469, 498. The "effects" mentioned were "business and commercial transactions which tended to restrict production, raise prices or otherwise control the market to the detriment of purchasers or consumers of goods and services." Id., p. 493. Such effects were brought about by "contracts for the restriction or suppression of competition in the market, agreements to fix prices, divide marketing territories, apportion customers, restrict production and the like practices, which tend to raise prices or otherwise take from buyers or consumers the advantages which accrue to them from free competition in the market." (Id., p. 497.)

There can be little question here that the Society has the power to fix prices for the right to publicly perform compositions for profit. Likewise, it has restricted substantially all competition in the sale of such right, because it has all such rights. Since the interstate commerce feature is conceded to be present, the Society clearly violates the act in question (*United States v. Socony-Vacuum Oil Co.*, 310 U. S. 150, 223) unless the right to publicly perform for profit is not embraced within the act. Upon that point the act says nothing expressly about rights or com-

\* *C. E. Stevens Co. v. Foster & Kieiser Co.*, 9 Cir. 109 Fed. (2nd) 764, 77.

modities. The statute is aimed at "restraints" of trade and commerce, and not at the "subjects" of the trade or commerce. Rights may be and often are the subject of trade or commerce, and the Sherman law limits restraints of trade in "rights" as well as commodities. Standard Sanitary Mfg. Co. v. United States, 226 U. S. 20, 49. The restraint here is the power acquired by the assignments of the Society's members, to deal in a right acquired by copyrights, and thus we have a contract or combination in restraint of trade. Straus v. Am. Publishers' Assn., 231 U. S. 222, 234.

Plaintiffs contend that if the activity of the Society "affects" trade or commerce, it promotes rather than restraints it." Here, we are not concerned with such question. Congress has decided that if such a combination has acquired power to fix prices, it is an illegal combination in restraint of trade. Plaintiffs further contend that the power to fix prices, as here, is not the odious "price-fixing" condemned by the act in question. They say that while a gallon of oil is the same no matter who sell it, musical compositions are not gallons of oil, but each of them is different. As we have said before it is immaterial what the subject of the trade or commerce may be. The fact is that the Society has acquired the power to fix the prices at which rights of a particular nature may be purchased by prospective users. We think that is sufficient under the statute.

*Buck v. Swanson* (D. C. Neb.) *supra*, *Buck v. Horton* (D. C.), *supra*, and *Buck v. Gibbs* (D. C. Fla.), *supra*, do not involve the point here taken.

Let the bill be dismissed.

**BERT EMORY HANEY,**  
*Circuit Judge.*

**JOHN C. BOWEN,**  
*District Judge.*

I concur in the result.

**LLOYD L. BLACK,**  
*District Judge.*

**APPENDIX "C-2"**  
**United States District Court**  
**For The Western District of Washington**  
**Southern Division**

**GENE BUCK, individually and  
 as President of the American So-  
 ciety of Composers, Authors and  
 Publishers, et al.,**

*Complainants,*

—vs.—

**PHIL H. GALLAGHER, as State  
 Treasurer of Washington;  
 BELLE REEVES, as Secretary  
 of the State of Washington,  
 et al.,**

*Defendants.*

**KMO, INC., Intervening defen-  
 dant, JOHN G. LOCKHART, In-  
 tervening defendant.**

**IN EQUITY**

**NO. 606**

**FINDINGS OF FACT  
 AND CONCLUSIONS  
 OF LAW.**

This matter coming on to be heard this 9th day of January, 1941; and it appearing from the records and files herein that counsel for all parties hereto have been served with copies of the notice hereto attached, and of these Findings of Fact and Conclusions of Law; and it appearing from the records and files herein that various motions have been made to dismiss plaintiffs' complaint on the ground and for the reason that the plaintiffs, in their main purpose and operations, violate laws of the United States dealing with monopolies and restraint of trade, and oral arguments having been made, and briefs filed by the various parties hereto, and the court having fully considered the matter, makes the following Findings of Fact:

## I.

That the plaintiff American Society of Composers, Authors and Publishers, hereinafter called the "Society" is a voluntary, unincorporated association organized under the laws of New York, for the purpose of licensing users of music to perform publicly for profit copyrighted works of its members; that the Society is composed of approximately 123 publishers of music and 1000 writers and composers; that all members have assigned to the Society the performing rights to all works owned by them; that societies having power to license performing rights of works owned by their members exist in foreign countries and have empowered plaintiff Society to license to perform all works composed and written by more than 44,000 members of said foreign societies; that all corporate and individual plaintiffs are members of the plaintiff Society; that the members have assigned to the Society the exclusive right of public performance of their copyrighted works, and the Society then has exclusive right to permit, by license, licensees to use or not to use the compositions of the Society's members, to fix the prices for licenses, to sue for infringement, and in general to manage the right of public performance in the same manner as the owner of a copyright.

## II.

That the defendants and intervenors have filed motions to dismiss plaintiffs' suit; that said motions have been treated by all the parties hereto as answers; that said motions and answers have raised the following questions:

- (1) Do plaintiffs in their main purposes and functions, violate Sections I and II (15 USCA Secs. and 2) of the Sherman Anti-Trust Act?

(2) If plaintiffs are violating the Sherman Anti-Trust Act are they thereby prohibited from obtaining the aid of a Court of equity in attacking a law of the State of Washington which places restrictions upon plaintiffs' activities?

### III.

The Court finds that plaintiffs' plan of operation, as set forth in their complaint and the exhibits attached thereto, and as shown by plaintiffs' evidence, does violate Sections 1 and 2 of the Sherman Act; that plaintiffs have such a monopoly of music available to commercial users of music that, according to the evidence in this case, said users cannot operate their various places of business without having available music controlled by plaintiffs; that, according to the evidence in this case, it is impossible to operate radio stations in the State of Washington without having available music controlled by the Society; that the plaintiff Society has the power to, and has, fixed prices for the works of its members; that the public performance of music by commercial enterprises is a subject of trade and commerce; that plaintiffs in their operations unreasonably restrain the interstate trade and commerce of the members of the Society and the interstate trade and commerce of licensees of the Society.

That the Society exercises the power to fix prices for the right to publicly perform compositions of its members for profit; that it has restricted substantially all competition in the sale of such rights; that the interstate commerce feature was conceded by plaintiffs to be present in the issues of this case; that the Society clearly violates the Act in question. (Sections 1 and 2 of the Sherman Anti-Trust Act, 15 USCA.)

And from the foregoing Findings of Fact the Court makes the following:

### **Conclusions of Law**

That plaintiffs are operating in direct violation of the laws of the United States, to-wit: Sections 1 and 2 of the Sherman Anti-Trust Act (15 USCA 1, 2); that plaintiffs do not come into Court with clean hands and are not entitled to obtain the aid of a court of equity in seeking the relief prayed for in the complaint; that a decree should be entered dismissing plaintiffs' suit.

DONE IN OPEN COURT THIS 9th Day of January, 1941.

Circuit Judge  
JOHN C. BOWEN,  
LLOYD C. BLACK,  
District Judges.

Presented by:  
CLARK R. BELKNAP,

Attorney for Intervener Lockhart. —

**APPENDIX "C-3"**  
**United States District Court**  
**For The Western District of Washington**  
**Southern Division**

GENE BUCK, individually and as President of the American Society of Composers, Authors and Publishers, et al.,

*Complainants,*

—vs.—

PHIL H. GALLAGHER, as State Treasurer of Washington, et al.,

*Defendants.*

K M O INC., intervening defendant,  
 JOHN G. LOCKHART, intervening defendant.

This matter coming on to be heard this 9th day of January, 1941; and it appearing from the records and files herein that counsel for all parties hereto have been served with copies of the notice hereto attached and of this Decree, and the Court heretofore having entered Findings of Fact and Conclusions of Law holding that plaintiff's cause of suit should be dismissed,

**THEREFORE IT IS HEREBY ORDERED, ADJUDGED AND DECREED BY the court that plaintiffs' suit be and the same is hereby dismissed and that defendants and intervenors have judgment for their costs and disbursements to be taxed.**

**DONE IN OPEN COURT this 9th day of January, 1941.**

JOHN C. BOWEN,

LLOYD C. BLACK,

*District Judges.*

Presented by:

CLARK R. BELKNAP,

*Attorney for Intervenor Lockhart.*

IN EQUITY  
 NO. 606  
 DECREE

**APPENDIX "D"**  
**In The District Court of the United States**  
**For The Eastern District of Wisconsin**  
**January Term, 1941**

Civil Action  
File No.

UNITED STATES OF AMERICA,

*Plaintiff.*

—vs.—

BROADCAST MUSIC, INC.

*Defendant.*

This cause came on to be heard on this day of January, 1941, the plaintiff being represented by Thurman Arnold, Assistant Attorney General, B. J. Husting, United States Attorney for the Eastern District of Wisconsin, Victor O. Waters, Special Assistant to the Attorney General, and Warren Cunningham, Jr., Special Attorney, and the defendant being represented by its counsel, and having appeared and filed its answer to the complaint herein.

It appears to the Court that defendant, Broadcast Music, Inc., has consented in writing to the making and entering of this decree, without any findings of fact, upon condition that neither such consent nor this decree shall be construed as an admission or adjudication that said defendant has violated any law.

It further appears to the Court that this decree will provide suitable relief concerning the matters alleged in the complaint filed herein and that by reason of the aforesaid consent of defendant, Broadcast Music, Inc., and its acceptance by plaintiff it is unnecessary to proceed with the

trial of the action, or to take testimony therein, or that any adjudication be made of the facts.

Now, therefore, upon motion of plaintiff, and in accordance with said consent, it is here

**ORDERED, ADJUDGED AND DECREED**

1. The Court has jurisdiction of the subject-matter set forth in the complaint and of the parties hereto with full power and authority to enter this decree and the complaint states a cause of action against defendant, Broadcast Music, Inc., under the Act of Congress of July 2, 1890, entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies" and the acts amendatory thereof and supplemental thereto.

II. Defendant, Broadcast Music, Inc., its officers, directors, agents, servants, employees and all persons acting or claiming to act on its behalf are hereby perpetually enjoined and restrained from entering into or carrying out, directly or indirectly, any combination or conspiracy to restrain interstate trade and commerce, as alleged in the complaint, by doing, performing, agreeing upon, entering upon or carrying out any of the acts or things hereinafter in the paragraph II prohibited:

(1) Defendant, Broadcast Music, Inc., shall not, with respect to any musical composition, acquire or assert any exclusive performing right as agent, trustee or otherwise on behalf of any copyright or other owner of the performing right, or pursuant to any understanding or agreement with such owner to pay for such right a share of, or an amount measured by, the receipts or revenues of said defendant. Nothing contained in this sub-paragraph (1)

shall be construed as preventing defendant, Broadcast Music, Inc., from acquiring or asserting exclusive performing rights (a) in any musical composition of which said defendant shall also own or acquire the copyright; (b) in any musical composition in the United States of America; (c) in any musical composition as a purchaser, assignee or licensee (but not as agent, trustee or otherwise on behalf of another) in consideration of the payment or agreement to pay, as the sole compensation for such performing rights, a fixed sum stated in the contract of purchase, assignment or license; or (d) in any musical composition, as a purchaser, assignee or licensee (but not as agent, trustee or otherwise on behalf of another) in consideration of the payment or agreement to pay, as the sole compensation for such performing rights, an amount determinable by reference to the number of licensed performances of such composition at a fixed per performance price and basis stipulated in such contract.

(2) Defendant, Broadcast Music, Inc., shall not enter into, recognize as valid or perform any performing license agreement which shall result in discriminating in price or terms between licensees similarly situated; provided, however, that differentials based upon applicable business factors which justify different prices or terms shall not be considered discrimination within the meaning of this subparagraph; and provided further that nothing contained in this subparagraph shall prevent price changes from time to time by reason of changing conditions affecting the market for or marketability of performing rights.

(3) Defendant, Broadcast Music, Inc., shall not require, as a condition to any offer to license the public performance for profit of a musical composition or compositions

for radio broadcasting, a license fee of which any part shall be (a) based upon a percentage of the income received by the broadcaster from programs in which no musical composition or compositions licensed by said defendant for performance shall be performed, or (b) an amount which does not vary in proportion either to actual performances, during the term of the license, of the musical compositions licensed by said defendant for performance, or to the number of programs on which such compositions or any of them shall be performed; provided, however, that nothing herein contained shall prevent said defendant from licensing a radio broadcaster, on either or both of the foregoing bases, if desired by such broadcaster, or upon any other basis desired by such broadcaster.

With respect to any existing or future performing license agreement with a radio broadcaster, defendant, Broadcast Music, Inc., shall not if required by such broadcaster, refuse to offer either or both of the following bases of compensation which may be specified by the broadcaster:

(I.) In respect of sustaining programs a per program license fee, expressed in terms of dollars, requiring the payment of a stipulated amount

for each program in which musical compositions licensed by said defendant shall be performed;

(II.) In respect of commercial programs, a per program license fee, either expressed in terms of dollars, requiring the payment of a stipulated amount for each program in which the musical compositions licensed by said defendant for performance shall be performed; or, at the option of

defendant, the payment of a percentage of the revenue derived by the licenses for the use of its broadcasting facilities in connection with such program.

In the event that defendant shall offer to license the public performance for profit of a musical composition or compositions for radio broadcasting upon one or more of the foregoing per program bases, and shall also offer to license such performance on a basis of compensation which shall not vary in direct proportion to the number of programs on which musical compositions licensed by defendant shall be performed, defendant shall establish, in good faith, a relationship between such per program basis and such other basis, justifiable by applicable business factors, so that there will be no frustration of the purpose of this sub-paragraph to afford radio broadcasters alternative bases of license compensation.

(4) Defendant, Broadcast Music, Inc., shall not license the public performance for profit of any musical composition or compositions except on a basis whereby, in so far as network radio broadcasting is concerned, the issuance of a single license, authorizing and fixing a single license fee for such performance by network radio broadcasting, shall permit the simultaneous broadcasting of such performance by all stations on the network which shall broadcast such performance, without requiring separate license for such several stations for such performance.

(5) With respect to any musical composition in defendant's catalogue of musical compositions licensed for radio broadcasting and which is or shall be lawfully recorded on an electrical transcription or other recordation intended

for broadcasting purposes, said defendant shall not refuse to license the public performance for profit by designated radio broadcasting stations of such composition by a single license to any manufacturer, producer or distributor of such transcription or recordation or to any advertiser or advertising agency on whose behalf such transcription or recordation shall have been made who may request such license, which single license shall authorize the broadcasting of the recorded composition by means of such transcription or recordation by all radio stations enumerated by the licensee, on terms and conditions fixed by said defendant, without requiring separate licenses for such enumerated stations.

(6) Defendant, Broadcast Music, Inc., shall not, in connection with any offer to license by it the public performance for profit of musical compositions, refuse to offer a license, at a price or prices to be fixed by said defendant, for the performance of such individual musical compositions or catalogues of musical compositions the use of which shall be requested by the prospective licensee.

(7) Defendant, Broadcast Music, Inc., shall not assert or exercise any right or power to restrict from public performance for profit by any licensee of said defendant any copyrighted musical composition in its licensed catalogue in order to exact additional consideration for the performance thereof, or for the purpose of permitting the fixing or regulating of fees for the recording or transcribing of such composition; provided, however, that nothing in this sub-paragraph shall prevent said defendant from restricting performances of a musical composition in order reasonably to protect the value of the public performance for profit rights therein or to protect the dramatic per-

forming rights therein or, as may be reasonably necessary in connection with any claim or litigation involving the performing rights in any such composition.

III. The terms of this decree shall be binding upon, and shall extend to each and every one of the successors in interest of defendant, Broadcast Music, Inc., and to any and all corporations, partnerships, associations and individuals who or which may acquire the ownership or control, directly or indirectly, of all or substantially all of the property, business and assets of defendant, Broadcast Music, Inc., whether by purchase, merger, consolidation, reorganization or otherwise. None of the restraints or requirements herein imposed upon the defendant shall apply to the acquisition of or licensing of the right to perform musical compositions publicly for profit outside the United States of America, its territories and possessions.

IV. For the purpose of securing compliance with paragraph II of this decree, and for no other purpose, duly authorized representatives of the Department of Justice shall, on the written request of the Attorney General or an Assistant Attorney General and on reasonable notice to defendant, Broadcast Music, Inc., made to the principal office of said defendant, be permitted (a) reasonable access, during the office hours of said defendant, to all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possessions or under the control of said defendant, relating to any of the matters contained in this decree, (b) subject to the reasonable convenience of said defendant and without restraint or interference from it, and subject to any legally recognized privilege, to interview officers or employees of said defendant, who may have counsel present, regard-

ing any such matters; and said defendant, on such request, shall submit such reports in respect of any such matters as may from time to time be reasonably necessary for the proper enforcement of this decree; provided, however, that information obtained by the means permitted in this paragraph shall not be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Department of Justice except in the course of legal proceedings in which the United States is a party or as otherwise required by law.

V. The provisions of sub-paragraph (4) of paragraph II of this decree shall not become effective until nine months after the effective date of the other provisions of said paragraph.

None of the provisions of paragraph II of this decree shall become effective until 90 days after plaintiff shall have delivered to defendant, Broadcast Music, Inc., a certified copy of a consent decree or other final decree of a court of competent jurisdiction not subject to further review by which restraints and requirements in terms substantially identically with those imposed herein shall be imposed upon American Society of Composers, Authors and Publishers; provided, however, that if said defendant shall be of the opinion that the restraints and requirements so imposed against American Society of Composers, Authors and Publishers are not substantially identically with those imposed herein, and shall apply to the Court within 20 days after receipt of a certified copy of said decree, for a determination of that question, no provision of said paragraph II shall become effective until the Court shall have determined that such restraints and requirements are substantially identical with those imposed herein.

VI. Jurisdiction of this cause is retained for the purpose of enabling any of the parties to this decree to make application to the Court at any time after the delivery to the defendant of a certified copy of a decree against American Society of Composers, Authors and Publishers complying with the provisions of paragraph V hereof for such further orders and directions as may be necessary or appropriate in relation to the construction of or carrying out of this decree, for the modification hereof upon any ground for the enforcement or compliance herewith and the punishment of violations hereof. Jurisdiction of this cause is retained for the purpose of granting or denying such applications so made as justice may require and the right of the defendant to make such application and to obtain such relief is expressly granted.

-----  
*United States District Judge.*

APPELLANTS'  
REPLY BRIEF

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CHARLES ELMORE CROPLEY  
CLERK

Supreme Court of the United States

October Term, 1940

No. 610

J. TOM WATSON (GIBBS) Individually and as  
Attorney General of the State of Florida, et al.,  
*Appellants*

—vs.—

GENE BUCK, Individually and as President of the American  
Society of Composers, Authors and Publishers, et al.  
*Appellees.*

No. 611

GENE BUCK, Individually and as President of the American  
Society of Composers, Authors and Publishers, et al.  
*Appellants*

—vs.—

J. TOM WATSON (GIBBS) Individually and as  
Attorney General of the State of Florida, et al.,  
*Appellees.*

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES  
FOR THE NORTHERN DISTRICT OF FLORIDA

**REPLY BRIEF FOR APPELLANTS (Defendants  
Below) In Case 610—and—APPELLEES  
in Case 611.**

J. TOM WATSON,  
Attorney General of  
Florida.

LUCIEN H. BOOGS,  
Jacksonville, Florida.

TYRUS A. NORWOOD,  
Assistant Attorney General  
of Florida.

ANDREW W. BENNETT,  
Washington, D. C.

Counsel for Appellants

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# Supreme Court of the United States

October Term, 1940

No. 610

J. TOM WATSON (GIBBS) Individually and as  
Attorney General of the State of Florida, et al.,  
*Appellants,*

—v.—

GENE BUCK, Individually and as President of the Ameri-  
can Society of Composers, Authors and Publishers, et al.,  
*Appellees.*

No. 611

GENE BUCK, Individually and as President of the Ameri-  
can Society of Composers, Authors and Publishers, et al.,  
*Appellants,*

—v.—

J. TOM WATSON (GIBBS) Individually and as  
Attorney General of the State of Florida, et al.,  
*Appellees.*

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## REPLY BRIEF FOR APPELLANTS (DEFEND- ANTS BELOW) IN CASE 610 AND APPELLEES IN CASE 611.\*

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### FOREWORD

Plaintiffs' brief is a lengthy one, occupying 94 pages ex-

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\* Emphasis in quoted matter in this brief is supplied unless otherwise indicated. Appellants in Case 611 and appellants in Case 610 will be referred to according to the position which they occupied in the lower court as "plaintiffs" and "defendants" respectively. Reference to "plaintiffs' brief" and "defendants' brief" will denote the opening briefs already on file in this Court. The word "Society" will denote the plaintiff, American Society of Composers, Authors and Publishers.

clusive of the 159-page Appendix. Much of their brief proper is repetitive, and it would be impossible without extending this brief to undue length to reply to every assertion or argument with which defendants take issue.

Therefore, this reply brief will concern itself only with such of the facts and arguments as are deemed essential to a proper understanding of the case. One fallacy in plaintiffs' brief has been reiterated so many times, that, in order to conserve the time of the court, it is best dealt with on the threshold:

A very large part of plaintiffs' argument is devoted to discussion of facts and legal principles which relate only to Sections 2-A, 2-B and 6 of the 1937 Act. In some instances one or more of these sections are specifically referred to, but in many places, the reference arises only by inference. At pages 31-35 inclusive of defendants' main brief, it is demonstrated that these three sections of the 1937 Act were repealed by the 1939 Act; that consideration of these sections is also moot in the instant case because the defendants, as enforcement officers of the State of Florida have no duties to perform concerning them. Relying upon the arguments made in their main brief, defendants will not attempt to deal with any contentions advanced by plaintiffs with regard to these sections other than in some of the instances where plaintiffs have referred to one or more of these sections by inference only, to point out that those are the sections involved.

The full text of these sections is printed in Appendix "A" to defendants' main brief (Secs. 2-A and 2-B, pp. 61, 62; Sec. 6, pp. 66, 67). However, for the court's convenience in identifying reference to them in plaintiffs' brief,

we digest the three sections briefly below:

Section 2-A in substance provides that all authors, composers and publishers selling any musical composition in Florida in whatever form published, printed, manufactured or prepared for use must cause to be specified thereon its selling price; that when a purchaser acquires the composition and pays the specified selling price, the purchaser may render or permit to be used or rendered such composition by players, orchestras, bands, radio apparatus, electrical transcriptions, music records or otherwise, either privately or publicly without further license fees or exactations, the initial selling price being deemed to be full compensation for all such renditions.

Section 2-B provides that if any author, composer or publisher fails to affix the selling price on a musical composition and collect the same in the time and in the manner provided in Section 2-A, then any person in Florida who has purchased such composition may use it for private or public performance for profit without further license fee and shall be free from liability in any infringement or injunction suit or suits instituted by the copyright proprietor.

Section 6 deals with radio stations, theaters, moving picture houses and similiar places of entertainment in Florida which are affiliated with concerns outside of the State originating the performance of copyrighted music, whether the original rendition of such music is by radio, sound production instrumentalities, or by furnishing persons to sing or play such music in the state. With respect to such concerns it places the entire responsibility and liability for the use of copyrighted music upon the affiliate outside the

state who originates the broadcast or other performance. It forbids the owner from suing for copyright infringement, loss or damage within this state because of the Florida performance, remitting him to make his collection from the outside affiliate.

Thus it is readily seen that these three sections are not limited to *combinations* of copyright owners, as are Section 1 and the sections of the 1937 Act dependent on Section 1. They are intended to apply with equal force to *all* copyright owners. Also it is apparent that any controversies which these three sections might evoke, would be controversies between *private parties* only, with which the defendant State enforcement officers would not be concerned. See Section 9 of the 1937 Act (def. br., pp. 68, 69), confining the duties of the state prosecuting officers to enforcing the Act against combinations as defined in Section 1.

Plaintiffs' brief does not refute the proofs overwhelmingly shown in the record (def. br. 11-22) that the Society constitutes a price-fixing combination in restraint of trade, but it tenders various excuses for its illegal operations such as: necessity for cooperative licensing (p. 8); blanket license only feasible method (p. 11); that blanket license is granted at low cost to user (p. 16) etc. However, these excuses can not justify plaintiffs' illegal price-fixing activities. See decisions of this court cited in defendants' brief, page 22.

Plaintiffs have directly referred to a letter written by Assistant Attorney General Norwood to Judge Foster (R. I, 96, 97) at pages 30, 46, 55, 56, and also made other references to this letter by implication in their brief. They

argue from this letter that the defendants have threatened to prosecute the Society under the 1937 Act if it attempts to bring infringement suits in the State of Florida.

This letter was pleaded *in extenso* in paragraph 8 of the Supplemental Bill (R. I, 96, 97) and referred to in paragraph 10 (R.I, 98). It is alleged that defendant, Attorney General Gibbs who succeeded Judge Landis would prosecute the complainants if they brought suits for infringement in the Federal Courts. In defendant Gibbs' answer to the Supplemental Bill the writing of the letter is admitted but the other allegations of threats are denied (R. I, 108). At the time of the writing of the letter, Cary D. Landis was Attorney General of Florida. He was succeeded by George Couper Gibbs, who was in turn on January 8, 1941 succeeded by J. Tom Watson. There is no proof in the record that Gibbs while Attorney General threatened to prosecute the plaintiffs if they instituted infringement suits. There is neither pleading nor proof of such threats by the incumbent Attorney General Watson.

Surely in the absence of such allegation and proof this court will not assume that either Gibbs or Watson will interfere with the rights of plaintiffs to sue for infringement specifically granted by the federal copyright law, particularly since the Florida statute does not attempt to make it unlawful for any owner of copyrights to sue for infringement. Suits of this character do not violate the eleventh amendment to the Federal Constitution because they are personal to the officers threatening to enforce the legislation. (Ex parte Young, 209 U. S. 123.)

## COMMENTS ON PLAINTIFFS' "QUESTIONS PRESENTED"

(Ptf. br. pp. 2, 3.)

The questions as stated by plaintiffs include some that are moot and others that plaintiffs do not even argue.

*Question 1 (b).* This question attacks by inference Section 4-A of the 1939 Act. It is unfairly stated, because that section (def. br. pp. 74-76) makes no requirement whatever as to how individual copyright owners should license their music. It regulates only blanket licensing by a combination of "two or more."

*Question 1 (d).* This question is not presented by the record in the instant case, since it assumes that the Society's method of doing business is the "only way that has been found to be commercially feasible." There is no evidence in the record that the Society has tried any other licensing method. It is interesting to note however, that the Society now professes its willingness to embark upon a different system of licensing, as shown by its consent to the decree entered against it in the Southern District of New York, March 4, 1941, in *United States v. American Society of Composers, Authors and Publishers*, a copy of which is attached as Appendix "A" to this brief.

*Question 1 (e) and (f).* These questions deal with Sections 2-A, 2-B and 6 of the 1937 Act, which as stated in the "Foreword" to this brief and demonstrated in defendants' main brief (pp. 31-35), are moot in the instant case.

*Question 2.* This question likewise is moot. So far as this record shows, all of the Society's license contracts expired December 31, 1940 (R. I, 33, 70).

**Question 5.** The record presents no such question. At no time have plaintiffs urged by pleading or argument any transgression of the commerce clause of the Federal Constitution by either of the Florida statutes. They argue no such question in their present brief.

### **ERRORS AND INACCURACIES IN PLAINTIFFS' "STATEMENT OF THE CASE"**

(Ptf. br. pp. 4-44)

The weakness of plaintiffs' arguments is emphasized by the frequently confusing and exaggerated statements in which they indulge in this portion of their brief—statements, which unless references are checked with the record, can serve only to mislead. Any attempt to point out all such exaggerated and misleading statements would unduly burden the time of the court, but a few of the more glaring examples should suffice to establish plaintiffs' lack of accuracy. Page references will refer to the corresponding pages of their brief unless otherwise indicated.

(*Page 8*). Under the caption "Cooperative Licensing Is Necessary Because of Divided and Diverse Ownership of Performing Rights," plaintiffs apparently seek to minimize the dominating position of the publishers (see defendants' main brief pp. 16-18). In the first sentence they state that

"Publishers are made members of the Society because as a rule the copyrights are in their names (R. II, 798)."

Read in connection with what follows, particularly the positive statement that

"The so-called 'small rights' \*\* are generally owned jointly by the writer and publisher to be administered through the Society" (citing various record pages)

one is led to believe that the publishers hold the copyrights as trustees. And this in spite of plaintiffs later admission (p.9) that the publishers dispute the writer's claim to co-ownership.

Moreover, one naturally assumes that the record citations referred to as supporting the statements are the best evidence, that is, the written contracts themselves, and that such contracts actually do support the positive statements of fact.

But when one examines the record citations, one learns differently. The first citation (R. II, 798) is to the testimony on cross-examination of plaintiff Buck, President of the Society, himself a writer with years of experience. But what does Mr. Buck say on page 789? We quote:

"Q. Let us get this straight about publishers members. There are one hundred and twenty-five members that are designated as publisher members; *they are the part of your organization that actually own the copyrights?*"

"A. They do, yes, in the majority of cases, \* \* \*. That copyright is taken out by the publisher and that is why the publisher must be in the American Society."

The record shows that the statement of co-ownership in the small performing rights is based on the self-serving

statements of several of plaintiffs own witnesses which are not supported by the testimony of other of plaintiffs' witnesses or by the written contracts which plaintiffs introduced in evidence. Plaintiffs' writer witness Leslie (R. I, 245, 251-3) based his contention on an alleged *verbal* agreement made with his publisher in 1914; Ahlert (R. I, 264-5, 270, 272) and Meyer (R. I, 392) testified to the co-ownership theory by answering leading questions, but produced no written contracts. There was a striking failure on the part of *publisher* members, a number of whom testified for the plaintiffs, to confirm the supposed joint ownership of the small rights.

The written contracts introduced by plaintiffs support Buck's statement that the publishers actually own the copyrights. Exhibit "A" to the bill (R. I, 37) specifically vests in the publisher "the rights during the full life of the copyright to authorize or permit the performance of the musical compositions." Exhibit 8 (R. II, 932) reserves to the composer the stage performing rights, but grants to the publisher "all other performing rights." Exhibit 7 (R. II, 990A) and Exhibit "A" (R. II, 1072A), the "Standard Uniform Popular Song-writers Contract" forms, approved in 1932 and 1939 respectively by the Society, the Song Writers Protective Association and the Music Publisher Protective Association, constitute an outright assignment of the copyrighted composition "and all rights of whatsoever nature thereunder existing."

The single exception to the control of small performing rights by the publisher shown by the record is in the case of the Victor Herbert compositions. Herbert reserved the ownership of the copyrights and merely granted to his

publishers the right to print and sell sheet music (R. II, 935-942).

(*Pages 9 and 10*). Under the caption "How the Society Functions," plaintiffs state that the eligibility for membership in the Society of a composer "depends upon his having written and regularly published at least five of his compositions." What they failed to state was that the required publication must be made *by publisher members of the Society*. The importance of that part of the requirement is strikingly shown by the efforts of plaintiffs' witness Mills to conceal it during his testimony at the trial (R. I, 517, 519, 520) although it had already been frankly admitted by plaintiffs' witness Taylor (R. I, 233). The effect of this requirement in increasing the monopolistic power of the Society is shown in defendants' main brief (pp. 16-18).

(*Page 11*). Here, in discussing the Society's mode of licensing, plaintiffs assert that payment on the basis of each individual performance is "admittedly" impossible (R. II, 787). From the use of the word "admittedly" would arise a natural inference that defendants conceded the truth of the statement. Such is far from being the case. The record reference furnished by plaintiffs is merely to a self-serving declaration of plaintiff Buck, President of the Society.

Likewise they completely avoid mention of the fact that the Society never has attempted to use a license contract wherein payment of license fees would be on the basis of each individual performance, though many of plaintiffs' own witness admitted on cross-examination that this meth-

od was used by them in licensing symphonies, grand rights, and the right to record on moving picture films, electrical transcriptions, etc. (Caesar, R. I, 205-217; Taylor, R. I, 232-233; Von Tilzer, R. I, 292; Fischer, R. I, 329; Schirmer 357-358; Bornstein, 374.) Certainly the problems presented in the licensing of such rights are no less complicated than those involved in the licensing of ordinary performing rights.

Moreover, defendants' witness Belviso, Manager of the Music Division of the National Broadcasting Company, who was duly qualified and accepted by the Court as an expert on the availability and licensing of music, testified that in quite a number of instances, he negotiated for and obtained the right to use material directly with the copyright holders on a "per piece or per use basis" and that usually there was no difficulty in fixing the price for the use or per piece arrangement (R. I, 562-563).

(*Pages 11-16*). Here again under the heading "The Blanket License Is the Only Feasible Method of Licensing the 'Small Right,'" adding further to the confusion already created, plaintiffs seek to justify their licensing system. They state (pp. 11, 12) :

"There are two possible methods of licensing performing rights; one is on a basis of the separate licensing of each composition for each separate performance; the other is a blanket license which permits the licensee to perform any composition in the licensor's repertoire without designating specific compositions in advance of the performance or securing separate licenses therefor."

Plaintiffs do not define what is meant by the terms "blanket license" and "blanket basis." The implication is that the terms are used interchangeably to describe the Society's method of licensing in force up to December 31, 1940, which has always been to make some sort of a flat charge to all licensees of either a fixed sum per year, a fixed percentage of gross income per year or both, whether the Society's music was used or not. They state (p. 13) that "the alternative to issuing blanket licenses would be a system of licensing each composition separately for each performance", implying that the choice lies solely between these two methods.

We suggest that this argument of plaintiffs is not based either on the impossibility or impracticability of any other method, but solely upon the unwillingness of plaintiffs to open the door of price competition and thereby weaken their domination "\*\*\*\* that actually wields the power of life and death over every business in Florida and elsewhere dependent upon copyrighted musical compositions for existence." (Mr. Justice Black, *Gibbs v. Buck*, 307 U. S. 66, 82.)

That "unwillingness" to comply with the Florida Statutes is the key to plaintiffs' opposition is revealed in so many words by the testimony of their own witness such as Caesar, R. I, 209; Taylor, R. I, 228-229; Leslie, R. I, 258.

Why not further alternative methods of licensing by agreement under which the licensee is permitted for a stated period to perform any compositions in the licensor's repertoire paying to the licensor a license fee based on either: (1) A stated sum for each copyright composition in licensor's repertoire which actually is performed by the

licensee; (2) A stated sum for each program in which one or more of the licensor's copyrighted compositions are performed; or (3) A stated percent of income derived by the licensee from each program in which one or more of licensor's copyrighted compositions are performed\*?

These are the methods which good business men generally have used in collecting royalties or license fees. They are the methods which plaintiffs have used in the licensing of grand rights and recording rights. They are the methods which the plaintiff composers and authors use with the plaintiff music publishers in collecting royalties on sheet music sales, phonograph records, electrical transcriptions, motion picture recordings, etc.

Such methods of licensing would require licensees to keep adequate records of performances for the purpose of accounting to the licensors for the license fees due. The fact that in the past few licensees have kept such records is no excuse for a continuation of the Society's past licensing method. Under that method no useful purpose would have been served by keeping the record.

If it is true as claimed in plaintiffs' brief that their past "blanket basis" of licensing "small rights" is the only feasible method, then why did they enter into the Consent Decree referred to on page 76 of their brief (*U. S. v. American Society of Composers, Authors and Publishers*, U. S. D. C. S|D N. Y., March 4, 1941, (copy attached as Appendix "A" to this brief)? The Consent Decree, in addition to

\*NOTE: This method was used by the Society for 8 years to a limited extent in the discriminatory form of contract made available to certain broadcasting stations owned by newspapers (R. II, 1007A to C incl.)

prohibiting other past practices of the Society such as the self-perpetuating Board of Directors, prohibits the Society from refusing to issue licenses on a per piece basis or on a per program basis, (1) or (2) or (3) above. It compels the plaintiff Society to make available to broadcasting stations either a per piece or per program basis of fee payments. True, *on the request of the licensee*, the Society is permitted to issue a blanket license such as heretofore used, but the fee payments of such blanket license must bear an ascertainable business relation to the fees charged on the per piece or per program basis required by the decree.

And why did they plead *nolo contendere* to the Criminal Information charging them with violations of the anti-trust laws filed against them in Wisconsin, thereby confessing themselves "guilty" for the purposes of that case, and subjecting them to fines actually imposed aggregating \$35,000 and to possible jail sentences as well (*U. S. v. American Society of Composer, Authors and Publishers*, U. S. D. C. E|D Wisconsin, filed February 5, 1941, sentence pronounced March 13, 1941; copy of Information attached as Appendix "B" to this brief.) Surely, if they had exercised the public performance rights given them by the Copyright Act in the *only way* in which those rights could be made effective, no court would have inflicted such punishment upon them.

Again we suggest that it is not the impossibility or impracticability of license payments based on the music actually used which motivates plaintiffs' claims that the past blanket license method enforced by it is the only feasible method, but that plaintiffs are motivated solely by

their unwillingness to license in any manner which will open the door to competition and thereby reduce their monopolistic and dominating power over the entertainment industries.

(Page 15). Plaintiffs lay great stress on the fact that "practically all licensing of this kind, whether by the Society or by other organizations, is conducted on a blanket license basis." They mention various other licensing units, including Broadcast Music Inc., recently created by the broadcasting industry. They fail to state that Broadcast Music Inc., entered into a consent decree similar to that of plaintiffs referred to above (*United States v. Broadcast Music Inc.*, U. S. D. C. E|D, Wisconsin, February, 1941, copied in def. br. 97-105 as Appendix "D").

The facts stated in this paragraph of plaintiffs' brief refute the charges elsewhere made in plaintiffs' brief (see especially pp. 68-72) to the effect that the statutes are "Bills of Attainder" directed against the plaintiffs. With other organizations conducting their business along the same lines as plaintiffs, it can not be supposed that the Florida Legislature was legislating merely against the plaintiff Society.

(Page 22-26). In this section of their brief, plaintiffs charge the users of music with "organized efforts to destroy plaintiff Society as means of securing free use of right of public performance for profit." They mention various litigations in court, bills introduced in the Federal Congress and in State Legislatures, including statutes enacted by State Legislatures.

We suggest that if these charges are true, the fact

strongly emphasizes the need for legislative intervention to remedy the harsh and oppressive use by plaintiffs of their monopolistic power. Legitimate business operations ordinarily would not be subjected to such attacks. And further, the lack of success in most of the alleged efforts of music users to obtain legislative protection speaks eloquently of the extensive power wielded by the plaintiff Society.

(*Page 26*). Plaintiffs' need of supporting evidence must indeed be great when they assert in the last paragraph of Section VII that "the users of music very frankly stated that their purpose in passing these statutes was to avoid the obligation of paying for public performances for profit of copyrighted music," and cited R. II, 848, in support thereof. The record reference is to a letter written by one single dance hall proprietor in the State of *Nebraska* who was resentful of the fact that the Society's local agent told him he had to pay what the agent demanded and that he could make him pay \$1,000 if he wanted to instead of the \$250 per year which he was paying (R. II, 835, 838, 854, 855). There is no other similar testimony in the record.

Of course, all this discussion overlooks completely the fact that courts do not gauge the constitutionality of legislation by the supposed motives of private individuals advocating its passage by the legislative body.

(*Pages 26 and 27*). Here the plaintiffs, attempting to escape the charge that the Society represents a combination that has dominated the industry, lay down the proposition that it "controls only a small part of the available music."

In so doing, they furnish references to numerous large catalogues of music which are owned by non-members of the Society. But the question is, not how many other music compositions are in existence, but how many of them are commercially available?

The latter question need not be argued because it has been abundantly proved out of the mouths of plaintiffs' own witnesses Buck, Schirmer and Mills as well as certain of defendants' witnesses including Belviso, music director for National Broadcasting Corporation, that *the Society controls an overwhelming proportion of all music available for commercial use in the United States* (def. br. pp. 13-16).

In this section of their brief plaintiffs also refer to Broadcast Music Inc., organized by the broadcasters to compete with the Society, and ask the court to take judicial notice of the refusal of the radio net works and the affiliated stations to renew their licenses from the Society which expired December 31, 1940. About this it need only be said that Broadcast Music Inc., is a new enterprise organized in 1940 and released for competition with the plaintiff Society only with the expiration of the latter's licenses January 1, 1941. No evidence of the extent of its operations or the availability of its music is before this court, and the case must be judged by the many years' control which the Society has exercised over the entertainment industries dating back for nearly 20 years.

Small wonder that the broadcasters have endeavored by organizing this new corporation to loosen the economic fetters by which they were bound!

(*Pages 28-43*). Here plaintiffs make their own argumentative analysis of the two Florida Statutes with much collateral matter thrown in. With most of this defendants are naturally in disagreement, and it is unnecessary to detail the numerous points of controversy, for they will be otherwise apparent to the court from a study of the briefs and consideration of the oral arguments. Therefore, in considering the few comments made by defendant below, the court will realize that with reference to the remainder of this section of plaintiffs' brief, silence does not give consent.

(*Page 28*). Plaintiffs here quote Conclusion of Law No. 1 of the court below (R. II, 1089-1090) to the effect that the 1937 Statute was not necessary to meet any alleged evil; that its enactment does not serve the public interest of the State of Florida; that the object of the statute is to take plaintiffs' copyrighted music for a "private purpose" viz., to benefit the "410 users" within the State of Florida.

With all due respect to the eminent court which entered these Conclusions, defendants insist that there is not one scintilla of evidence in the record to support such an indictment of the Florida Legislature. On the contrary, the record speaks abundantly of the monopolistic practices which were prevailing in Florida as elsewhere at the time of the enactment of the 1937 Statute. Full detail of these facts, all of which the Legislature must be presumed to have known, is found in plaintiffs' main brief (pp. 11-21).

And why that court, even if it saw fit to find that the statute was not enacted in the public interest, should have concluded that it was enacted for the benefit of "410 users", we are at a loss to understand.

(Page 31). Here in paragraphs (2) and (3), Sections 2-A and 2-B of the 1937 Act are attacked. As pointed out in the "Foreword" to this brief, these sections are now moot, as well as Section 6 (p. 32, par. (10); pp. 33, 34 par. 11 (d)).

On this same page (31), paragraph (5) refers to the Society's "*existing contracts*" as declared void by Section 3 of the 1937 Act. So far as this record shows, the Society has no "*existing contracts*," and this court can not be expected to take judicial notice of what licenses the Society may have issued since December 31, 1940.

(Page 35). In paragraph (e), plaintiffs attack Sections 11-A and 11-B of the 1937 Act. It is obvious from a bare inspection of these sections (def. br. pp. 69, 70) that they are purely procedural. There is no reason to doubt that when and if these sections are invoked in a suit actually pending, the court having jurisdiction of the case will administer these provisions with due regard for the constitutional rights of the defendants in that case.

(Page 39). In discussing 4-A of the 1939 Act, plaintiffs state that before issuing "any blanket license" the person issuing it must file schedule of prices with affidavit of the copyright owner, etc. Attention is directed to the fact that the whole of Section 4-A (ptf. br. pp. 74-76) is limited in its operation to cases where two or more copyright owners combine "for the purpose of issuing blanket licenses \*\*\* upon a blanket royalty or fee" covering music owned or controlled by the members of the combination. Section 4-A imposes no restriction whatever upon the manner in which the individual copyright owner not forming part of such a combination may license his music.

## ARGUMENT

### I. Plaintiffs Show No Reason Why They Should Not be Barred of Relief By the "Clean Hands" Doctrine Because of Their Monopolistic Practices (ptf. br. pp. 90-92).

In defendants' main brief (pp. 9-22), there is made a complete factual analysis of the price-fixing activities of plaintiffs which operate directly in restraint of trade, impede the flow of interstate commerce with regard to radio broadcasting, sales of sheet music and other articles of commerce, and flagrantly violate the Sherman Anti-Trust Act. This demonstration is followed (pp. 22-28) by citation of authorities establishing that the "clean hands" maxim applies to just such a situation as this where the aid sought is in furtherance of the monopoly. Attached as Appendix "C-1" to defendants' brief (pp. 84-91) is the unreported decision of the three-judge District Court for the Western District of Washington in *Buck v. Gallagher* entered December 23, 1940, dismissing for this reason the bill of the plaintiffs filed to restrain the enforcement of a statute of the State of Washington in many respects similar to the Florida statute here involved. (See also ptf. br. App., pp. 147-153.)

This court will naturally inquire what showing plaintiffs have made to offset all this. We submit that the answer to this question is, "precisely nothing."

On the factual side, there is nothing in their 94 pages of brief or in the record to contradict the price-fixing activities of the combination represented by plaintiff Society, or the pernicious effects which those operations have produced upon the public entertainment industries in Florida and elsewhere; nothing to contradict the effect of defend-

ants' authorities showing that equity should not lend its aid to perpetuate these restrictions of trade.

Plaintiffs refer (p. 90) to the decision of this court affirming the temporary injunction (*Gibbs v. Buck*, 307 U. S. 66) as though the court had decided the invalidity of the "clean hands" defense. Upon examination of the opinion it is seen that it did no such thing, either expressly or by inference. The majority opinion (307 U. S. 68-79) did not deal with this defense at all. It decided no more than that (1) there was federal jurisdiction, and (2) that there was no abuse of discretion on the part of the lower court in granting the preliminary injunction. As to the action of the lower court in over-ruling the motion to dismiss, this court said (p. 76) :

"Whether to grant or refuse a motion to dismiss *before answer* is largely a matter of discretion for the court below."

After the first appeal was disposed of, answers were filed presenting this specific defense (R. I, 108-9, 188) which have been overwhelmingly supported and nowhere contradicted by the record (def. br. p. 11-22). The lower court failed to deal with this defense in its Findings of Fact and Conclusions of Law (R. II, 1082-1092) or in its opinion (R. II, 1092-1104), and the question stands wide open for this court to decide.

Plaintiffs cite (p. 91) *Standard Oil Company (Ind.) v. U. S.*, 283 U. S. 162 as though it gave them a clean bill of health for their price-fixing operations. They have seriously misinterpreted that decision. It dealt with a peculiar state of facts where there were overlapping patents and

the pooling was accomplished to prevent litigation between the owners. In the course of its opinion this court said (283 U. S. 174) :

*"Where domination exists, a pooling of competing process patents, or an exchange of licenses for the purpose of curtailing the manufacture and supply of an unpatented product is beyond the privileges conferred by the patents and constitutes a violation of the Sherman Act."*

It further found (pp. 176-179) that the facts in that case disproved the existence of monopoly or restriction of competition.

A different situation is presented by the case at bar where the license fee imposed is not based upon the use of the copyrighted music, but upon a flat percentage of the licensee's receipts or other equally arbitrary standards, thereby restraining competition through depriving the user of all incentive to use other music or other kinds of entertainment programs. (See *Motion Picture Patents Co. v. Universal Film Co.*, 243 U. S. 502, 517; *Ethyl Gasoline Corp. v. United States*, 309 U. S. 436, 456.)

The point raised by plaintiffs at page 92 to the effect that violation of the anti-trust acts are no defense to an *infringement suit* is conceded as an abstract proposition of law. Obviously it has no applicability to the instant case.

**II. The Plaintiffs Have Failed to Show That the Provisions of the 1937 Act Were Inseparable, and Failed to Overcome the Presumption of Separability Created by the Saving Clause Therein (ptf. br. pp. 93-94).**

The defendants at pages 28-37 of their main brief have

demonstrated that the lower court was in error in striking down the entire 1937 Act because it found that Sections 2-A, 2-B, 4-A, 4-B, 5-A, 5-B and 6 were unconstitutional, and that these sections were inseparable from the remaining provisions of the Act.

At page 93 of their brief, the plaintiffs attempt to show that the 1937 Act is inseparable and that the court's act invalidating the entire 1937 Act because it found certain sections unconstitutional was correct. Their argument is clearly erroneous and illogical because it ignores:

- (1) The presumption of severability created by the saving clause, Section 12 of the 1937 Act.
- (2) The legislative interpretation of severability of the Act in Section 15 of the 1939 Act which repealed all inconsistent laws but expressly saved from the repealing clause all of the 1937 Act except Sections 2-A, 2-B and 6.
- (3) The separate and distinct purpose of Section 1 and its dependent sections, the anti-monopoly provisions, not found per se unconstitutional by the lower Court from Sections 2-A, 2-B, 4-A, 4-B, and 6, the "without pay" provisions which were held to be per se unconstitutional by the lower Court.
- (4) The fact that Sections 4-A, 4-B, 5-A and 5-B are only additional deterrents to price-fixing combinations violating Section I of the Act, and are thus subordinate and incidental to the fundamental purpose of the Act, which was to prohibit the operation of price-fixing combinations in the State of Florida.
- (5) The fact that the defendants have no duties to per-

form with respect to Sections 2-A, 2-B and 6 of the 1937 Act.

(6) The fact that, if the sections which the Court held per se unconstitutional viz: 2-A, 2-B, 4-A, 4-B, 5-A, 5-B and 6 are eliminated, the remaining provisions of the Act still constitute a complete anti-monopoly statute.

**III. The Enactment of the Statutes Was within the Police Power of the State of Florida and Plaintiffs Have Failed to Show the Contrary (ptf. br. pp. 75-78).**

In defendants' main brief (pp.38-46), it has been shown that, notwithstanding the fact that federal copyrights have their origin in the Federal Constitution, this court has recognized the right of the states to enact reasonable measures for the protection of their citizens against known evils practiced in the use of such rights. The leading case of *Allen v. Riley*, 203 U. S. 347, is there analyzed and shown to be pertinent because the protection of the citizens of a state against monopolistic practices is a function of state governments, no less than is the protection of its citizens against frauds with reference to ownership.

That there was shown a known evil to curb is amply demonstrated in defendants' main brief (pp. 11-22 incl.). The demonstration there made has been in no wise offset by any facts or arguments in plaintiffs' brief.

In the effort to take their case out of the police power of the state, plaintiffs at page 75 reiterate their contention that the statutes were not enacted in the public interest, but "to benefit the 410 users within the State of Florida,"

citing in support thereof a Conclusion to that effect found by the lower court (R II, 1089-90). The fact that the lower court entered this Conclusion without any basis in the record or in law to support it has already been dealt with (supra, p. 18), and there is no need to argue it again, as it is in the teeth of the evidence and the pleadings in this case.

Again (pp. 76, 77) plaintiffs state that "the statutes are designed to prohibit a lawful enterprise," citing in support certain cases of inferior courts in the States of New York and Washington, and of British courts containing commendatory language as to some of the functions of the Society and the British Society. Suffice it to say that these cases do not involve the question at bar.

At page 77, plaintiffs say:

"The evidence is conclusive that without such collective action the exclusive right of public performance for profit, vested in the copyright owner, becomes an unenforceable and valueless right, existing in theory only, and robbed of all commercial value. The individual copyright owner standing alone is helpless and hopeless. Necessity compels copyright owners to act collectively in order to exercise the exclusive right of public performance for profit. A statute which prevents them from acting collectively confiscates this right."

There is no warrant whatever for this statement. There is not one word in either of the Florida statutes which prevents individual copyright owners from associating themselves together for the purpose of detecting and prosecut-

ing infringements, or obtaining the necessary information upon which they might individually fix license fees on a competitive basis. As this record shows, most of the commercially available musical copyrights are owned by large and successful publishing houses (e. g. Carl Fisher Inc. whose music currently published is listed in eleven printed catalogues; R. II, 991). Such business houses certainly would not be lacking in means to determine the proper basis upon which to offer licenses for ordinary "small rights" any more than they are to determine the basis for dramatico-music rights, sound film tract rights or other licenses which they enter into without the assistance of the Society.

And so, the quotation from *Allen v. Riley*, *supra* inserted at page 79 of plaintiffs' brief to the effect that state legislation which "would result in a prohibition of the sale of the species of property within its borders" would be unconstitutional is entirely inapplicable to the Florida statutes.

At page 78 of plaintiffs' brief, they state that the legislation was "certainly not necessary to accomplish the purpose of destroying any alleged *monopoly* because earlier Florida statutes \* \* \* \* *amply provide for the regulation and punishment of combinations in restraint of trade.*" Here we pause to inquire just what interpretation plaintiffs put upon the earlier Florida anti-monopoly statutes (C.G.L. Fla. Secs. 7944-7954). At page 67 plaintiffs analyze the case of *Brock v. Hardie*, 114 Fla. 670, saying:

"It is also pointed out in that case (p. 697) that combinations which do not deal in any article of merchandise, manufacture, trade or commerce, are not within the condemnation of the Florida

anti-trust laws."

Which of these inconsistent interpretations do plaintiffs ask this court to adopt, their own interpretation that the earlier statutes *do* protect the Florida public against monopolies in the licensing of intangible rights in copyrighted music, or the decision of the Florida Supreme Court that these earlier statutes *do not* cover that field?

**IV. The Statutes Do Not Deny the Equal Protection of the Laws to Owners of Copyrighted Music (ptf. br. pp. 60-68, 73-75).**

At pages 60-64, plaintiffs complain of discrimination because the statutes do not regulate the owners of musical works not copyrighted but merely protected by the common law.

It suffices to point out that material differences in the factual situation justify fully the action of the Legislature in classifying and regulating the licensing of musical copyrights. As said by Mr. Justice Frankfurter in *Tigener v. Texas*, 310 U. S. 141, 147, 149:

"The Constitution does not require things that are different in fact or opinion to be treated in law as though they were the same. \* \* \* Here again, we must be mindful not of abstract equivalents of conduct, but of conduct in the context of actuality. Differences that permit substantive differentiations also permit differentiations of remedy."

To like effect see numerous decisions of this court illustrative of the reasonableness of the classification made by the Florida statutes including:

*Carroll v. Greenwich Ins. Co.*, 199 U. S. 401.

*International Harvester Co. v. Missouri*, 234 U. S. 199.

*Radice v. New York*, 264 U. S. 292.

The owners of uncopyrighted musical works have not, to the knowledge of anyone, combined to fix prices or for other purposes, and there is no indication of any intention to do so.

For the same reason there is no merit in plaintiffs' contention (p. 73) that the 1937 Act discriminates in favor of copyright owners residing outside of the United States because it imposes no regulation upon them. Certainly it was competent for the Legislature to determine that there was no serious jeopardy to the public interest from the operations of foreign musical copyright holders, or, at least, it could determine that the activities of copyright holders in the United States presented a distinct evil, requiring regulation. It is a matter of common knowledge that most of the music used in public performances for profit is controlled by American copyright owners. The Legislature in its discretion simply found that the operations of foreign copyright owners in Florida did not immediately require regulation.

Nor is there any merit in plaintiffs' contention (p. 65) that the penalties imposed for violation of the statutes here under consideration are far more severe than those imposed under other Florida anti-monopoly laws.

The penalties imposed by Section 8 of the 1937 Act are seen by plaintiffs' own statement to be identical with those imposed by the earlier anti-monopoly acts, and in view

of the decision of the Supreme Court of Florida in *Brock v. Hardie*, *supra*, cited at page 67 of plaintiffs' brief, that the earlier anti-monopoly laws do not cover intangibles such as public performance rights, the penalties can not be cumulative as argued by plaintiffs on page 65.

Plaintiffs' complaint as to sections 11-A and 11-B (pp. 68-7) is premature, as these sections are procedural merely, and in the absence of any actual case depriving a defendant of his constitutional right, it will be assumed that the court having jurisdiction of the case will protect him.

**V. The Florida Statutes Create No "Arbitrary Presumption of Guilt" and The McFarland Case Is Not in Point (ptf. br. pp. 68-72).**

Here plaintiffs attack the 1937 Statute because (pp. 70, 71) it makes illegal price-fixing combinations constituting a substantial number of composers, authors and publishers. They digest the case of *McFarland v. American Sugar Refining Co.*, 241 U. S. 79, charging that the Florida statute creates the like arbitrary and unconstitutional presumptions of guilt.

This attack, too, is unfounded. Upon examining the McFarland case, it becomes clear that the feature of the Louisiana legislation there declared obnoxious to constitutional safeguards was the creation of legislative presumptions of guilt which had no real relationship to the offense denounced and were unreasonable as arbitrary legal proof. That statute was notably bad in creating a presumption of monopoly from the mere fact that the defendant had paid in Louisiana a less price for sugar than it paid elsewhere. Such fact was declared not to be reasonable proof of a monopoly and incapable even by legisla-

tive declaration of taking the place of proof necessary to conviction.

In the instant case neither of the Florida acts attempted to create any such extreme presumptions or any evidentiary presumptions.

Section 1 of the 1937 Act upon which plaintiffs rely in attempting to apply the McFarland case simply declares a combination of a substantial number of copyright holders for the purpose of fixing prices to be in restraint of trade. Far from being similar to the "presumption" clauses of the Louisiana statute in the sugar case, the language of the Florida Act is closely analogous to that long employed and upheld in the Sherman Act as well as in many other federal and state statutes.

In *United States v. Trenton Potteries Co.*, 272 U. S. 392, and numerous other cases decided before and since, this court has recognized price-fixing as a hall-mark of monopoly, and so the Legislature was creating no presumption, but merely recognizing one which already existed.

#### VI. The Objection That the State Statutes Impair Obligations under Existing Contracts Is Unfounded (ptf. br. p. 83).

At this place in their brief, plaintiffs complain of Section 3 of the 1937 Act because it renders void existing contracts by Florida music users with combinations declared unlawful under Section 1 of the Act.

As heretofore pointed out, the question is moot so far as this case is concerned because plaintiff Society's license agreements expired December 31, 1940 (R. I, 33, 70) and there is no evidence as to what contracts, if any, may

have been entered into since that time.

Pretermitted this point however, there is no doubt of the lawfulness of such a provision:

*Atlantic Coast Line R. Co. v. Goldsboro*, 232

U. S. 548

*New Orleans Gas Light Co. v. Louisiana Light  
Co.*, 115 U. S. 650

*Union Dry Goods Co. v. Georgia Public Service  
Corp.*, 248 U. S. 372

*Stephenson v. Binford*, 287 U. S. 251, 276

*Home Building & Loan Association v. Blaisdell*,  
290 U. S. 398, 434-5

**CONCLUSION**

Plaintiffs urge:

(1) That the bill, supplemental bill and further supplemental bill should be dismissed by application of the "clean hands" doctrine, because equity should not lend its aid to perpetuate the plaintiffs' price-fixing activities in restraint of trade—just as was done by the 3-judge Court in the Western District of Washington, to enjoin enforcement of the Washington statute (def. br. App. "C-1", "C-2", "C-3", pp. 84-95); or, in the alternative,

(2) That the anti-monopoly provisions of the 1937 Act and Sections 4-A and 4-C of the 1939 Act be adjudged to be within the police power of the State of Florida, and not subject to the other constitutional attacks levied by plaintiffs.

Respectfully submitted,

**J. TOM WATSON,**  
**Attorney General of Florida.**

**TYRUS A. NORWOOD,**  
**Assistant Attorney General.**

**LUCIEN H. BOGGS,**

**ANDREW W. BENNETT,**  
*Counsel for Defendants,*

**APPENDIX "A"**

**In the District Court of the United States for the  
Eastern District of Wisconsin**

**No. 449 Q (CRIMINAL)**

**UNITED STATES OF AMERICA**

*v.*

**AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, ET AL., DEFENDANTS**

**INFORMATION**

At the January, 1941, Term of the District Court of the United States for the Eastern District of Wisconsin, held at Milwaukee, Wisconsin, in said District, comes the United States of America, acting through B. J. Husting, United States Attorney in and for said District, and leave of the Court having first been obtained, informs the Court as follows:

**I****Description of defendants**

1. That American Society of Composers, Authors and Publishers, hereinafter referred to as "Society", an unincorporated membership association of music composers, authors and publishers, having its principal office at 30 Rockefeller Plaza, New York, New York, is made a defendant herein.
2. That the following individuals, who have been or are now officers or directors of Society as indicated after their names, actively engaged during the period covered by this Information in the management, direction and control of the affairs and polices of the Society, and in particular of those affairs and policies which are covered by this Infor-

mation, who have authorized, ordered and done the acts of the defendants constituting the offenses hereinafter charged, are likewise made defendants herein.

1. Gene Buck, President and Director.
2. Louis Bernstein, Vice President and Director.
3. Otto A. Harbach, Vice President and Director.
4. George W. Meyer, Secretary and Director.
5. Gustave Schirmer, Treasurer and Director.
6. Fred E. Ahlert, Director.
7. Saul Bornstein, Director.
8. J. J. Bregman, Assistant Secretary and Director.
9. Irving Caeser, Assistant Treasurer and Director.
10. Max Dreyfus, Director.
11. George Fischer, Director.
12. Walter Fischer, Director.
13. Raymond Hubbell, Director.
14. Jerome Kern, Director.
15. Edgar Leslie, Director.
16. Jack Mills, Director.
17. Herman Starr, Director.
18. John O'Connor, Director.
19. J. J. Robbins, Director.
20. Oley Speaks Director.
21. Deems Taylor, Director.
22. Will Von Tilzer, Director.
23. John Mercer, Director.
24. Oscar Hammerstein II, Director.
25. E. C. Mills, Chairman Administrative Committee.
26. John G. Paine, General Manager.

The following corporations which have had divers officers and agents and representatives on the Board of Di-

rectors of the Society:

Shapiro, Bernstein & Co., Inc., Organized and duly authorized to do business under the laws of the State of New York;

Irving Berlin, Inc., Organized and duly authorized to do business under the laws of the State of New York;

Bregman, Vocco & Conn, Inc., Organized and duly authorized to do business under the laws of the State of New York;

Chappell & Co., Inc., Organized and duly authorized to do business under the laws of the State of New York;

T. B. Harms Company, Organized and duly authorized to do business under the laws of the State of New York;

J. Fischer & Bros., Organized and duly authorized to do business under the laws of the State of New York;

Carl Fischer, Inc., Organized and duly authorized to do business under the laws of the State of New York;

Mills Music, Inc., Organized and duly authorized to do business under the laws of the State of New York;

Words & Music, Inc., Organized and duly authorized to do business under the laws of the State of New York;

Robbins Music Corporation, Organized and duly authorized to do business under the laws of the State of New York;

Leo Feist, Inc., Organized and duly authorized to do business under the laws of the State of New York; Miller Music, Inc., Organized and duly authorized to do business under the laws of the State of New York;

G. Schirmer, Inc., Organized and duly authorized to do business under the laws of the State of West Virginia;

Boston Music Company, Organized and duly authorized to do business under the laws of the State of West Virginia;

Willis Music Company, Organized and duly authorized to do business under the laws of the State of Ohio;

Harms, Inc., Organized and duly authorized to do business under the laws of the State of New York; M. Whitmark & Sons, Organized and duly authorized to do business under the laws of the State of New York;

Remick Music Corporation, Organized and duly authorized to do business under the laws of the State of New York;

Harry Von Tilzer Music Publishing Co., Organized and duly authorized to do business under the laws of the State of New Jersey

are made defendants herein.

3. That all members of the Society, in addition to those made defendants herein, are expressly named as co-conspirators herein.

## II

**The society**

4. That defendant Society, an unincorporated association, was organized in or about the year 1914, by the leading publishers, composers and authors of musical compositions in the United States, for a period of ninety-nine (99) years from the date of its organization; that the purposes for which it was organized were, among other things, to grant licenses and collect royalties for the public performance of the works of its members, to allot and distribute the royalties collected, and to accumulate and maintain a reserve fund to be used in carrying out any of the objects of the Society; that its membership at the time of the filing of this Information consists of approximately 140 publishers and 1,200 composers and authors and includes the owners of the copyrights of a substantial amount, more than 75 percent, of all the copyrighted musical compositions demanded by the public of the United States for entertainment purposes at the time of the filing of this Information and for a number of years prior thereto; that the management of defendant Society is vested exclusively in a self-perpetuating board of directors consisting of 24 persons, 12 of whom represent publisher members, 6 represent composer members, and 6 represent author members; that each director is elected to serve for a period of three years, and is eligible for reelection upon the expiration of his term; that the terms of office of eight members of said board expire each year, and their successors are elected annually by the remaining members of the board; that the directors have exclusive and absolute control of the management and of all activities of the Society and appoint all its committees, officers and em-

ployees; that admission to membership in the Society is by election thereto by the board; that each member upon admission must execute an agreement in the form required by the board of directors, assigning to the Society the exclusive nondramatic public performance for profit rights of all of the members' works for the period of any then existing agreement between the Society and its members; that the agreement between the Society and its members, a copy of which is hereto attached marked Exhibit "A" and expressly made a part hereof, expired December 31, 1940; that the agreements between the Society and its members, existing prior to December 31, 1940, have been renewed for a further ten-year period; that by reason of the vast number of copyrights of compositions controlled by the members of the Society, by reason of the great public demand therefor, and by reason of the vesting of the absolute management and control of all activities of the Society in the self-perpetuating board of directors, the twenty-four persons constituting such board have the power to and do fix the price of and control the public performance for profit rights of the greater part of the music demanded by the public of the United States for entertainment purposes.

5. That licenses to perform publicly for profit the musical compositions copyrighted by its members are issued by the Society upon application therefor; that agents of the Society solicit applications for such licenses by threat of prosecution for infringement of the copyright laws of the United States, from all unlicensed persons, firms or corporations in the United States who use music in connection with their business; that defendant Society refuses to grant licenses to perform single musical compositions or

groups of compositions selected by the licensees; that it grants only blanket licenses to perform any and all musical compositions of all its members upon the payment of such royalty as is demanded by the board of directors of the Society; that six forms of licenses have been and are in use, copies of which are hereto attached and marked Exhibits "B", "C", "D", "E", "F", "G", respectively, and are expressly made a part hereof; that Exhibit "B" is the form of license which radio broadcasting stations not owned at least 51 percent by newspapers were required to accept prior to December 31, 1940; that Exhibit "C" is the form of license which radio broadcasting stations owned at least 51 percent by newspapers were offered, accepted by many and outstanding prior to December 31, 1940; that Exhibit "D" is the form of license which theatres are required to accept; that Exhibit "E" is the form of general license which all other users of musical compositions are required to accept; that Exhibit "F" is the only form of license offered radio broadcasting stations not originating programs as part of a chain broadcast, or the simultaneous broadcasting of programs over two or more stations, subsequent to December 31, 1940; that Exhibit "G" is the only form of license offered radio broadcasting stations originating programs as part of a chain broadcast or the simultaneous broadcasting of a program or programs over two or more stations, subsequent to December 31, 1940.

6. That defendant Society maintains agents and representatives throughout the United States, whose duty is to enforce the demands of the Society in the sale of licenses and in collecting royalties therefor.

## III

**The radio broadcasting industry**

7. That, the term "radio broadcasting station" is used herein to designate those radio stations operated for the entertainment of the residents of the United States and residents of adjacent and more distant foreign countries; that there are approximately 793 such radio broadcasting stations interspersed throughout the states of the United States and operated under authority of the Federal Communications Commission, pursuant to the Act of Congress known as the Communications Act of 1934, approved June 19, 1934, and prior Acts of Congress; that each station is required to broadcast a minimum regular operating schedule of two-thirds of the hours it is authorized to broadcast under the license granted it by the Communications Commission; that the continued existence, success and prosperity of a radio broadcasting station depends entirely upon the entertainment offered by it to the radio listening public within the range of the station's power; that music is the principal form of entertainment demanded by the radio listening public and must be offered by a station in order to retain the continuing interest and patronage of the listening public; that approximately 50 percent of the time devoted to the transmission of energy, ideas and entertainment across state or national boundaries by radio broadcasting stations in the United States is devoted to the radio broadcasting of music in varying forms, and such music must represent the rendition of compositions most desired by the listening public; that the only income available to a station is derived from the sale of its facilities to persons desiring to communicate energy, ideas and entertainment to the public within listening

range of the station's transmission power; that such sale of facilities consists primarily of sales to business concerns for the purpose of advertising the products of the particular concern and of creating good will on the part of the public for the services or products of the advertiser; that the desirability of a particular station for advertising purposes is directly dependent upon the number of persons listening to the programs broadcast by that station, and such persons can only be induced to listen to the station's broadcasts by furnishing the musical entertainment demanded by the radio audience; that a substantial portion of the entertainment furnished by the station must be furnished at the expense of the station, for which is receives no compensation or income.

8. That during all the time herein mentioned it has been and is essential to the continued operation of each of the stations in the United States broadcasting radio entertainment, in order to avoid liability for infringement of copyright, to obtain the permission or license of the owners of the copyrighted musical compositions the public performance of which is demanded by the radio audience.

#### IV

##### **The interstate commerce involved**

**A. In radio broadcasting**

9. That radio broadcasting stations in the United States are engaged in interstate or foreign commerce; that each station is an instrumentality through which energy, ideas and entertainment are transmitted across state or national boundaries to the radio listening population of the United States or foreign countries; that approximately 40 percent of the time devoted to the transmission of energy, ideas

and entertainment across state or national boundaries by radio broadcasting stations in the United States has been devoted to the radio broadcasting of copyrighted musical compositions owned or controlled by the Society and its members; that as each radio station under the copyright laws must obtain permission from the copyright owners of musical compositions before such compositions can be broadcast in interstate commerce, any interference with or restraint upon the obtaining of such permission from the copyright owners upon a competitive basis restrains the interstate and foreign transmission of energy, ideas and entertainment by radio broadcasting stations.

10. That there has developed in the radio industry a practice which is commonly called "chain" or "network" broadcasting; that by this method of operation several radio broadcasting stations are connected in a chain or network by means of leased telephone lines for the purpose of broadcasting simultaneously radio programs originating at one of the stations in the network; that this method is generally inaugurated and controlled by what is known as a network company; that the principal network companies presently existing in this country are the National Broadcasting Company, the Columbia Broadcasting System, and the Mutual Broadcasting System; that approximately 350 radio stations located in the United States are affiliated with and engaged in such "network" broadcasting; that only those network stations which originate network programs have control over the selection of the content of the programs which are broadcast simultaneously by all of the stations in the network; that approximately 45 percent of the total time devoted to network broadcast-

ing in this country is devoted to the broadcasting of musical compositions; that a substantial number of the copyrighted musical compositions performed over radio networks during the period covered by this Information were owned or controlled by the Society and its members; that the network stations other than those originating network broadcasting, have no control whatsoever over the selection of the musical compositions which are performed by the several stations comprising the network.

B. In sheet music

11. That each defendant who is a publisher member of defendant Society prints, or causes to be printed, the music and lyrics, and special arrangements thereof, of musical compositions; that such printed sheets of music are sold by such defendants to customers located in all states of the United States and are transported across state boundaries in interstate commerce; that the greater part of the musical compositions broadcast by radio stations is performed by entertainers located in the studio of particular broadcasting stations, or in close proximity thereto, from musical scores transported across state boundaries.

12. That the essential element in effecting the sale and distribution of sheet music throughout the United States is the transmitting of musical compositions to the ear of the public, in order to create a desire on the part of individual members of the public to purchase the printed score representing particular compositions; that radio broadcasting is the principal medium through which individual musical compositions are transmitted to the ear of the purchasing public and a demand for the printed score created; that by means of the combination and conspiracy

hereinafter described, defendant Society through the issuance of only blanket licenses authorizing the performance of the Society's entire repertoire of music at a price which requires the payment of a percentage of the revenue derived from all radio programs regardless of whether Society owned or controlled music is performed, has destroyed the economic incentive on the part of radio stations, having the Society's license, to perform the musical compositions of authors, composers and publishers not members of Society, thereby depriving those owners of copyrighted musical compositions who are not members of defendant Society of the opportunity of transmitting their musical compositions to the ear of the purchasing public, with the result that the sale of scores written by nonmembers to purchasers in states of the United States other than the state where such scores were manufactured, and the transportation thereof across state and national boundaries, is and has been restrained.

C. Motion picture films

13. That motion picture films are produced primarily in the States of New York and California, and shipped to motion picture exhibitors located in every state in the United States; that these motion picture films are produced and shipped in interstate commerce for the sole and exclusive purpose of exhibition or public performance by motion picture exhibitors; that without the right to exhibit or perform, the motion picture films are rendered valueless and restricted from a free flow in interstate commerce; that a substantial portion of the motion picture films are synchronized with music to the extent that the films cannot be exhibited without per-

forming the music synchronized therewith; that a great majority of the music synchronized with the films is copyrighted music, the public performance for profit rights of which are controlled by the Society; that the Society, therefore, has the power to fix the price of, control or otherwise unreasonably restrain the usage of a substantial portion of the motion picture films passing in interstate commerce.

**D. Electrical transcriptions**

14. That electrical transcriptions are mechanical devices upon which programs are recorded or mechanically reproduced for the exclusive use of radio broadcasting stations; that more than 50 percent of the electrical transcriptions produced in the United States are produced or manufactured in the States of New York and California and shipped to radio broadcasting stations located throughout the United States; that upon practically all of these electrical transcriptions are recorded musical compositions; that a substantial portion of the music so recorded is copyrighted music owned or controlled by the Society and its members.

**V**

**The combination and conspiracy**

15. That for many years preceding as well as during the period of three years next preceding the filing of this Information, and continuing to the date of the filing thereof, defendants, and others to the United States Attorney unknown, well knowing the foregoing facts, have been engaged in the United States, and particularly in the Eastern District of Wisconsin, in a wrongful and unlawful combination and conspiracy in restraint of the aforesaid interstate and foreign trade and commerce in radio broad-

casting, sheet music, motion picture films, and electrical transcriptions in violation of Section 1 of the Act of Congress of July 2, 1890, entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies" (U. S. C. A., Title 15, Section 1), commonly known as the Sherman Act, and have conspired to do all acts and things and to use all means necessary and appropriate to make said restraints effective, including the means, acts and things hereinafter more particularly alleged and other means, acts and things which at the time of filing this Information are unknown to the United States Attorney; that as part of said conspiracy the defendants have arranged and agreed among themselves to do the following things:

A. To create, maintain and utilize defendant Society as an instrumentality for promoting and maintaining the illegal combination and conspiracy herein described; to create defendant Society as such instrumentality with a self-perpetuating board of directors and to vest in the twenty-four persons constituting such board the exclusive power to control the activities of defendant Society; to restrict membership in defendant Society to such composers and authors who have written or composed and had regularly published not less than five copyrighted musical compositions, and to such publishers as may be approved by the board of directors; to have transferred to and to pool in defendant Society the sole and exclusive right to perform publicly for profit all musical compositions of which all the members of Society are the copyright proprietors, or which any member, either alone or jointly or in collaboration with others, wrote, composed, published,

acquired or owned, or in which any member has any right, title, interest, or control whatsoever, in whole or in part, or which any member during the term of the agreement may write, compose, acquire, own, publish or copyright, either alone, jointly, or in collaboration with others, or in which any member may at any time, during the term of the agreement, have any right, title, interest or control, either in whole or in part; to have all members of defendant Society vest in defendant Society absolutely until and including December 31, 1940, the sole and exclusive right to license others to perform publicly for profit all their musical compositions; to renew and extend the agreements between Society and its members which expired December 31, 1940, for a further ten-year period.

B. To vest in defendant Society a complete monopoly of the right to license for public performance for profit all the musical compositions of all its members, aggregating an unknown number of musical compositions; to refuse to furnish to its licensees complete lists of the musical compositions in the Society's repertoire of music; to eliminate competition among members of defendant Society in the sale of rights to perform publicly their respective musical compositions, which, but for the illegal combination and conspiracy herein described, would have existed; to refuse radio broadcasting stations, advertisers (desiring to utilize the service of such stations to promote the sale of their merchandise), orchestras, theatres, and others desiring the right to perform publicly the copyrighted musical compositions of members of defendant Society, the right to acquire from the individual members of the Society the public performance for profit rights of their

respective copyrighted musical compositions; to require commercial users desiring only certain musical compositions in the Society's repertoire to accept a blanket license from defendant Society for all of its copyrighted musical compositions, upon terms and conditions arbitrarily fixed by it.

C. To agree to establish and maintain, and pursuant to such agreement, to establish and maintain, by means of the pooling of their individual copyright monopolies, enhanced and non-competitive prices or royalties for licenses to perform publicly copyrighted musical compositions owned and controlled by individual defendants; to eliminate all competition among members of defendant Society in the sale of licenses to perform publicly their individual musical compositions and to exercise the power obtained by defendants through the unlawful pooling of their individual copyright monopolies by concertedly refusing to license the public performance by radio broadcasting stations and all other persons engaged in the public performance for profit of copyrighted music of any copyrighted musical composition owned and controlled by a member of defendant Society, except on the basis of a general license covering any and all musical compositions of all members and except upon the basis of an arbitrary royalty for such general license, fixed and determined by the aforesaid self-perpetuating board of directors of defendant Society; to require compliance with the terms fixed by the defendants by radio broadcasting stations affiliated with radio "networks," prior to December 31, 1940, by issuing licenses to network affiliated radio stations only on the basis that the license issued to each station was not to be construed

as authorizing the license to grant others any right to perform publicly for profit by any means, method or process whatsoever. The radio stations affiliated with a radio "network," other than the station originating the radio program, have had no control over the copyrighted musical compositions performed by the network affiliated stations simultaneously. Broadcasting stations affiliated with radio "networks" have had to accept a license from defendant Society upon any terms and conditions imposed by defendant Society, or subject themselves to numerous infringement suits in which they would be compelled to pay not less than \$250 for each copyright infringement, as provided in the copyright laws of the United States.

D. Concertedly to demand and receive from radio broadcasting stations increased amounts as royalties for licenses to perform publicly copyrighted musical compositions owned and controlled by members of defendant Society; to notify on or about April 1, 1932, all radio broadcasting stations throughout the United States that, on and after June 1, 1932, defendant Society would issue to broadcasting stations only a general license covering all musical compositions of all members of defendant Society, which license would require the payment annually as royalty of a sum approximately equal to the annual royalty theretofore paid by them, and in addition thereto, 5 percent of the gross income of the broadcasting station from whatever source derived. This fee represented an increase of approximately 400 percent in so-called "royalty" payments over the aggregate royalty demanded for the previous year. Protests were made by the broadcasting stations to defendant Society and the then existing licenses were tem-

porarily extended to September 1932. Thereupon efforts were made by the broadcasting stations, acting through a committee appointed for the purpose, to obtain licenses providing for royalty payments by each station based on the number of performances by such station of copyrighted musical compositions owned and controlled by Society or its members. The defendants refused to agree to royalty payments based on actual use made of their musical compositions. Other proposals submitted by the broadcasting stations were also rejected by defendants. Each broadcasting station, in order to use the copyrighted musical compositions controlled by defendant Society and to avoid a multiplicity of infringement suits, acceded to the demands of defendant Society and accepted from defendant Society a three-year blanket license agreement, commencing on or about September, 1932, covering all musical compositions of all members of defendant Society, upon the basis of a royalty payment approximately equal to the fixed annual royalty paid for the preceding year, plus three percent of the station's net receipts during the first year of the agreement, four percent of such receipts during the second year, and five percent of such receipts during the third year. "Net receipts" as defined in said agreement, constituted the full amount paid to the station for the use of its broadcasting facilities, after deducting commissions not exceeding fifteen percent, if any, paid to an independent advertising agent or agency.

E. To refuse to alter or change the terms of the contracts executed by and between the Society and radio broadcasting stations in 1932, which expired December 31, 1935; and to issue an ultimatum on or about January 10,

1936, in writing, to the various radio broadcasting stations to the effect that the performance of copyrighted musical compositions in the Society's repertoire of music would constitute a copyright infringement unless the existing contracts were renewed by January 15, 1936. The radio broadcasters located throughout the United States had no alternative but to accept the terms dictated by the Society, since they could not operate without being subjected to the \$250 minimum damage provision for each copyright infringement of the copyright laws by performing music owned and controlled by the Society and its members. Within the specified time they accepted renewals of the contracts executed in 1932. These contracts executed in 1932, expired on December 31, 1940.

F. To refuse to renew the licenses to radio broadcasters which expired December 31, 1940, under threat of withdrawing from the interstate commerce of radio broadcasting and public enjoyment the vast pool of copyrighted music acquired by the Society, by means of the illegal conspiracy alleged herein and under the further threat of inflicting the \$250 minimum damage provision of the copyright laws, unless the radio broadcasters accepted the licenses attached hereto and marked Exhibits "F" and "G." The percentage of income demanded by members of defendant Society from radio broadcasting stations since 1932, represents a percentage of the entire income received by such broadcasting stations for the sale to advertisers of their operating time on the air. Such demand for the payment of these percentages constitutes a charge upon income received by radio broadcasting stations for their time devoted to the broadcasting of

lectures, dramatizations, sporting events, and other programs, which employ none of the copyrighted musical compositions of the members of defendant Society.

G. To withdraw on January 1, 1941, from approximately 568 radio broadcasting stations interspersed throughout the United States, including the three national network systems, National Broadcasting Company, Columbia Broadcasting System and Mutual Broadcasting System, who had not accepted a license at the price and terms fixed by the defendants, the right to broadcast in interstate commerce and to deprive the radio listening public of the privilege of hearing and enjoying all the copyrighted music of all the respective members of the Society.

H. To create and maintain, prior to December 31, 1940, a distinction and discrimination between the license agreements exacted of radio broadcasting stations owned at least 51 percent by newspapers and license agreements exacted from radio broadcasting stations not so owned. The license agreement offered by defendant Society to broadcasting stations owned 51 percent by newspapers, and accepted by many, did not require payment to defendant Society of a percentage of the station's income derived from all advertisers, but only required the payment of 3 percent of the income of the station received from advertisers whose programs included musical compositions owned or controlled by members of defendant Society. This 3 percent was payable until the total amount paid by the station equalled an amount agreed upon between the station and defendant Society. Thereafter, the station was required to pay 5 percent of all additional

income received by it from programs in which musical compositions owned or controlled by members of defendant Society were used.

I. To insert provisions or terms in all the license agreements to users of music which permit the copyright owner, through defendant Society, to withdraw at will from the operation of the license any musical compositions owned or controlled by such copyright owner and thereby prevent its broadcast by the broadcasting station, thereby enabling members of defendant Society to withdraw musical compositions in the Society's repertoire in great demand by the general public, for the purpose of collecting additional compensation for the right to perform publicly for profit and for the further purpose of collecting enhanced and non-competitive fees for the right to record and reproduce mechanically copyrighted musical compositions reproduced for public performance for profit; and to force radio broadcasting stations to accept all terms and conditions imposed by members of defendant Society for the right to broadcast popular musical compositions which have been withdrawn from the Society's general licenses.

J. To require radio broadcasting stations to accept a blanket license as heretofore stated upon terms and conditions imposed by defendant Society, thereby securing for members of the Society the exclusive use of radio broadcasting as a means of conveying musical compositions to the ear of the public-at-large, destroying the economic incentive of broadcasting stations to use the musical compositions of composers, authors and publishers who are not members of defendant Society and thereby preventing non-

members of defendant Society from receiving the compensation for the rights of public performance of their musical compositions, which they would otherwise receive, and limiting and restricting the popular demand of the listening public to musical compositions controlled by defendant Society.

K. To require acceptance of their arbitrary and non-competitive demands for royalties by all classes of music users, as a condition precedent to the acquisition by such music users of the right to perform any copyrighted musical compositions of any members of the Society publicly for profit. The motion picture exhibitors interspersed throughout the United States must perform those musical compositions synchronized with the motion picture films in order to exhibit the motion picture films. Without the right to exhibit and perform the musical compositions synchronized therewith, the motion picture films received in interstate commerce are valueless. All users of music must perform those musical compositions demanded by their audiences. The limitation and restriction of popular demand to the musical compositions controlled by defendant Society has forced such users of music to obtain from defendant Society a license to perform music controlled by defendant Society so demanded by the public. The members of defendant Society, through defendant Society have concertedly refused to grant such users permission to perform individual musical composition selected by the users, but have insisted and still insist that general licenses be accepted which cover all the musical compositions of all the members of defendant Society, upon payment of a fixed amount therefor, irrespective of whether

one or more of such musical compositions are actually performed. By this method of licensing the members of defendant Society have further restricted the popular demand to those musical compositions owned or controlled by the members of defendant Society, and, have prevented the use of musical compositions owned by non-members of defendant Society.

L. To prevent the sale and transportation in interstate commerce of musical scores owned by composers authors and publishers who are not members of defendant Society, by refusing to issue licenses for the public performance of musical compositions owned or controlled by them, except upon the terms and conditions above set forth.

M. To adopt and maintain a comprehensive system for the acquiring of detailed and complete information relative to the musical compositions used by broadcasting stations, by means of which information the members of defendant Society have been and are enabled to conduct their operations through defendant Society so as to prevent the development of competition between members of defendant Society and owners of copyrighted musical compositions who are not members of defendant Society, and to maintain and enforce all provisions of the licenses between Society and radio broadcasting stations.

## VI

### **Purpose and effect of the conspiracy**

16. That the defendants have adopted the means and engaged in the activities aforesaid, with the intent, purpose and effect unreasonably and unlawfully maintaining

enhanced and uniform prices in the interstate commerce in copyrighted musical compositions controlled by Society, and have otherwise restrained unreasonably the interstate commerce of radio broadcasting, sheet music, motion picture films, and electrical transcriptions; that all members of defendant Society, through the mutual and identical agreements hereinbefore described, have actively and effectively restrained their own activities, have eliminated competition among themselves, and have created, maintained and utilized defendant Society as an instrumentality unreasonably to restrain and restrict, directly and indirectly the interstate trade and commerce; as hereinbefore described.

## VII

### **Jurisdiction and venue**

17. That the combination and conspiracy herein set forth has operated and has been carried out in part within the Eastern District of Wisconsin, and many of the unlawful acts pursuant thereto have been performed by defendants and their representatives in said District; that the interstate trade and commerce in radio broadcasting, sheet music, motion picture films and electrical transcriptions as herein described, is carried on in part within said District; that said defendants have usual places of business in the said District and therein transact business and are within the jurisdiction of the Court.

18. That this Information is filed and the jurisdiction of this Court is invoked against defendants American Society of Composers, Authors and Publishers, its officers and directors, and the members thereof, because of their violations, jointly and severally, as herein alleged,

of Section 1 of the Sherman Act, entitled "An Act to Protect Trade and Commerce against Unlawful Restraints and Monopolies."

And so, the United States Attorney accuses and says:

That the defendants throughout the period aforesaid, at the places and in the manner and form aforesaid, unlawfully have engaged in a combination and conspiracy in restraint of the aforesaid trade and commerce in radio broadcasting, sheet music, motion picture films, and electrical transcriptions among the several states and with foreign nations; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States.

B. J. HUSTING,  
*United States Attorney*

THURMAN ARNOLD,  
*Assistant Attorney General.*

VICTOR O. WATERS,  
*Special Assistant to the Attorney General.*

WARREN P. CUNNINGHAM,  
*Special Attorney.*

**APPENDIX "B"**

In the District Court of the United States for the  
Southern District of New York

Civil Action No. 13-95

UNITED STATES OF AMERICA, PLAINTIFF

v.

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISH-  
ERS; GENE BUCK, PRESIDENT; GEORGE W. MEYER, SEC-  
RETARY; AND GUSTAVE SCHIRMER, TREASURER; DEFEND-  
ANTS

**CIVIL DECREE AND JUDGMENT**

This cause came on to be heard on this 3d day of March, 1941, the plaintiff being represented by Thurman Arnold, Assistant Attorney General, Victor O. Waters, Special Assistant to the Attorney General, and Warren Cunningham, Jr., Special Attorney, and the defendants being represented by their counsel, and having appeared and filed their answer to the complaint herein.

It appears to the Court that defendants herein have consented in writing to the making and entering of this decree, without any findings of fact, upon condition that neither such consent nor this decree shall be construed as an admission or adjudication that said defendants have violated any law.

It further appears to the Court that this decree will provide suitable relief concerning the matters alleged in the complaint filed herein and that by reason of the aforesaid consent of defendants and its acceptance by plaintiff it is unnecessary to proceed with the trial of the action, or to take testimony therein, or that any adjudication be made of the facts.

Now, THEREFORE, Upon motion of plaintiff, and in accordance with said consent, it is hereby

**ORDERED, ADJUDGED AND DECREED**

I. The Court has jurisdiction of the subject-matter set forth in the complaint and of the parties hereto with full power and authority to enter this decree and the complaint states a cause of action against the defendants under the Act of Congress of July 2, 1890, entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies" and the Acts amendatory thereof and supplemental thereto.

II. Defendants, Gene Buck, as President of the American Society of Composers, Authors and Publishers; George W. Meyer, Secretary; Gustave Schirmer, Treasurer; and American Society of Composers, Authors and Publishers, its officers, directors, agents, servants, employees, members, and all persons acting or claiming to act on its behalf are hereby perpetually enjoined and restrained from entering into or carrying out, directly or indirectly, any combination or conspiracy to restrain interstate trade and commerce, as alleged in the complaint, by doing, performing, agreeing upon, entering upon or carrying out any of the acts or things hereinafter in this paragraph II prohibited.

(1). Defendant, American Society of Composers, Authors and Publishers, shall not, with respect to any musical composition, acquire or assert any exclusive performing right as agent, trustee or otherwise on behalf of any copyright owner, its members, or other owner of the performing right, or pursuant to any understanding or agree-

ment with such owner, or its members, to pay for such right a share of, or an amount measured by, the receipts or revenues of said defendants. Nothing herein contained shall be construed as preventing defendant, American Society of Composers, Authors and Publishers, from regulating the activities of its members in the following respects: (a) By requiring all moneys derived from the issuance of licenses by the respective members of defendant to be paid by the licensee to defendant and distributed in the same manner as other revenues; (b) by requiring of its members that notice be given the defendant of their intent to issue licenses before the issuance of same; (c) by prohibiting the members from issuing exclusive licenses to commercial users of music; (d) by requiring, as a condition precedent to the issuance of a license by an individual member of the Society, the approval and consent, to be obtained by the licensor, of the composer(s), author(s) and publisher subject to such reasonable regulations as may be adopted by the composer(s), author(s), and publisher for that purpose; (e) by prohibiting the members from granting or assigning, to persons, firms, corporations or enterprises, including Broadcast Music, Inc., the right to license or assign to others the right to perform publicly for profit the respective copyrighted musical compositions of which performance rights are owned or controlled by the respective members of the defendant Society.

(2) Defendant, American Society of Composers, Authors and Publishers, shall not enter into, recognize as valid or perform any performing license agreement which shall result in discriminating in price or terms between

licensees similarly situated; provided, however, that differentials based upon applicable business factors which justify different prices or terms shall not be considered discriminations within the meaning of this sub-paragraph; and provided further that nothing contained in this sub-paragraph shall prevent price changes from time to time by reason of changing conditions affecting the market for or marketability of performing rights.

(3) Defendant, American Society of Composers, Authors and Publishers, shall not require, as a condition to any offer to license the public performance for profit of a musical composition or compositions for radio broadcasting, a license fee of which any part shall be (a) in respect of commercial programs, based upon a percentage of the income received by the broadcaster from programs in which no musical composition or compositions licensed by said defendant for performance shall be performed, or (b) in respect of sustaining programs, an amount which does not vary in proportion either to actual performance, during the term of the license, of the musical compositions licensed by said defendant for performance, or to the number of programs on which such compositions or any of them shall be performed; provided, however, that nothing herein contained shall prevent said defendant from licensing a radio broadcaster, on either or both of the foregoing bases, if desired by such broadcaster, or upon any other basis desired by such broadcaster.

With respect to any existing or future performing license agreement with a radio broadcaster, defendant, American Society of Composers, Authors and Publishers, shall not, if required by such broadcaster, refuse to offer

a per program basis of compensation on either or both of the following bases which may be specified by the broadcaster:

(1) in respect of sustaining programs a per program license fee, expressed in terms of dollars, requiring the payment of a stipulated amount for each program in which musical compositions licensed by said defendant shall be performed;

(2) in respect of commercial programs, a per program license fee, either expressed in terms of dollars, requiring the payment of a stipulated amount for each program in which the musical compositions licensed by said defendant for performance shall be performed, or, at the option of defendant, the payment of a percentage of the revenue derived by the licensee for the use of its broadcasting facilities in connection with such program.

In the event that defendant shall offer to license the public performance for profit of a musical composition or compositions for radio broadcasting upon either or both of the foregoing per program bases, and shall also offer to license such performance on a basis of compensation which shall not vary in direct proportion either to actual performances during the term of the licenses of the musical compositions licensed by said defendant for performance or to the number of programs on which musical compositions licensed by defendant shall be performed, defendant shall act in good faith so that there shall be a relationship between such per program basis and such other basis, justifiable by applicable business factors, including availability, so that there will be no frustration of the purpose of this sub-paragraph to afford radio broadcasters alterna-

tive bases of license compensation.

(4) Defendant, American Society of Composers, Authors and Publishers, shall not license the public performance for profit of any musical composition or compositions except on a basis whereby, insofar as network radio broadcasting is concerned, the issuance of a single license, authorizing and fixing a single license fee for such performance by network radio broadcasting, shall permit the simultaneous broadcasting of such performance by all stations on the network which shall broadcast such performance, without requiring separate licenses for such several stations for such performance.

(5) With respect to any musical composition in defendant's catalogue of musical compositions licensed for radio broadcasting and which is or shall be lawfully recorded for performance on specified commercially sponsored programs on an electrical transcription or on other specially prepared recordation intended for broadcasting purposes, said defendant shall not refuse to offer to license the public performance for profit by designated radio broadcasting stations of such compositions by a single license to any manufacturer, producer or distributor of such transcription or recordation or to any advertiser or advertising agency on whose behalf such transcription or recordation shall have been made who may request such license, which single license shall authorize the broadcasting of the recorded composition by means of such transcription or recordation by all radio stations enumerated by the licensee, on terms and conditions fixed by said defendant, without requiring separate licenses for such enumerated stations.

(6) Defendant, American Society of Composers, Authors and Publishers, shall not, in connection with any offer to license by it the public performance for profit of musical compositions by users other than broadcasters, refuse to offer a license at a price or prices to be fixed by said defendant for the performance of such specific (i. e., per piece) musical compositions, the use of which shall be requested by the prospective licensee.

(7) Defendant, American Society of Composers, Authors and Publishers, shall not, in connection with any offer to license by it the public performance for profit of musical compositions by radio broadcasters, refuse to offer a license on a per performance or per program basis as provided for in paragraph II (3) hereof at a price or prices to be fixed by said defendant for the performance of such programs, the use of which shall be requested by the prospective licensee.

(8) Defendant, American Society of Composers, Authors and Publishers, shall not assert or exercise any right or power nor shall any of its members exercise any right or power to restrict from public performance for profit by any licensee of said defendant any copyrighted musical composition in order to exact additional consideration for the performance thereof, or for the purpose of permitting the fixing or regulating of fees for the recording or transcribing of such composition; provided, however, that nothing in this sub-paragraph shall prevent said defendant or its members from restricting performances of a musical composition in order reasonably to protect the work against indiscriminate performances or the value of the public performance for profit rights therein or to

protect the dramatic performing rights therein, or, as may be reasonably necessary in connection with any claim or litigation involving the performing rights in any such composition.

(9) The Society shall not elect the members of the Board of Directors in any manner other than by a membership vote in which all author, composer and publisher members shall have the right to vote for their respective representatives to serve on the Board of Directors. Due weight may be given to the classification of the member within the Society in determining the number of votes each member may cast for the election of directors. Upon the expiration of the terms of office of the present directors, the provisions of this section shall apply to the election of their successors. Thereafter, not less than one-twelfth of the total membership of the Board of Directors shall be elected annually.

(10) Defendant, American Society of Composers, Authors and Publishers, shall provide in its by-laws that the Society shall not distribute to its members the moneys received by granting the right to perform copyrighted musical compositions publicly for profit on any basis other than the number, nature, character and prestige of the copyrighted musical compositions composed, written or published by each member, the length of time in which the works of the member have been a part of the catalog of the Society, and popularity and vogue of such works, all to be determined in a fair and non-discriminatory manner.

(11) Defendant, American Society of Composers, Authors and Publishers, shall not require as a condition

precedent to eligibility for author or composer membership in the Society the regular publication of more than one musical composition or writing by any person who regularly practices the profession of writing music and the text or lyrics of musical works.

III. The terms of this decree shall be binding upon, and shall extend to each and every one of the successors in interest of defendant, American Society of Composers, Authors and Publishers, and to any and all corporations, partnerships, associations and individuals who or which may acquire the ownership or control, directly or indirectly, of all or substantially all of the property, business and assets of defendant, American Society of Composers, Authors and Publishers, whether by purchase, merger, consolidation, re-organization or otherwise. None of the restraints or requirements herein imposed upon the defendant shall apply to the acquisition of or licensing of the right to perform musical compositions publicly for profit outside the United States of America, its territories and possessions.

IV. For the purpose of securing compliance with this decree, and for no other purpose, duly authorized representatives of the Department of Justice shall, on the written request of the Attorney General or an Assistant Attorney General and on reasonable notice to defendant, American Society of Composers, Authors and Publishers, made to the principal office of said defendant, be permitted (a) reasonable access, during the office hours of said defendant, to all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of said defendant, relating

to any of the matters contained in this decree; (b) subject to the reasonable convenience of said defendant and without restraint or interference from it, and subject to any legally recognized privilege, to interview officers or employees of said defendant, who may have counsel present, regarding any such matters; and said defendant, on such request, shall submit such reports in respect of any such matters as may from time to time be reasonably necessary for the proper enforcement of this decree; provided, however, that information obtained by the means permitted in this paragraph shall not be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Department of Justice, except in the course of legal proceedings in which the United States is a party or as otherwise required by law.

V. This decree shall become effective ninety (90) days after the entry hereof, except that the provisions of subparagraph (6) of paragraph II shall become effective nine (9) months after the effective date of the other provisions of this decree.

VI. Jurisdiction of this cause is retained for the purpose of enabling any of the parties to this decree to make application to the Court any time after the effective date hereof for such further orders and directions as may be necessary or appropriate in relation to the construction of or carrying out of this decree, for the modification hereof upon any ground for the enforcement of compliance here-with and the punishment of violations hereof. Jurisdiction of this cause is retained for the purpose of granting or denying such applications so made as justice may re-

quire and the right of the defendant to make such application and to obtain such relief is expressly granted.

Approved:

HENRY W. GODDARD,  
*United States District Judge.*

We hereby consent to the entry of the foregoing decree.

For the complainant:

THURMAN ARNOLD,  
*Assistant Attorney General.*

VICTOR O. WATERS,  
*Special Assistant to the Attorney General.*

WARREN CUNNINGHAM, JR.,  
*Special Attorney.*

For the defendants:

CHARLES POLETTI,  
MILTON DIAMOND,  
SCHWARTZ & FROHLICH,

By HERMAN FINKELSTEIN,  
*Member of the Firm.*

Judgment rendered March 4th, 1941.

GEORGE J. H. FOLLMER,  
*Clerk.*

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